Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

ROTHBURY INVESTMENTS, LTD.,
a Canadian Corporation, and
RISI STONE, LTD.,
a Canadian Corporation,

Petitioners,

v.

DURA-CORP., INC.,
a Pennsylvania Business Corporation,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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10618

QUESTION PRESENTED

I. WHETHER THE APPARENT *EX PARTE* CONTACT AND PARTICIPATION IN THE DRAFTING OF THE NON JURY TRIAL COURT'S DECISION BY OPPOSING COUNSEL WHO WAS ALSO AN EXPERT WITNESS FOR THE PREVAILING PARTY VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY THE XIV AMENDMENT TO THE U.S. CONSTITUTION, SECTION 1.

PARTIES TO THE PROCEEDING

Petitioner, Rothbury Investments, Ltd. is a Canadian corporation which licensed certain patented concrete retaining wall products to the Respondent, Dura-Corp.

Petitioner, Risi Stone, Ltd., a Canadian corporation, was a party to a contract for payment of a promissory note by the Respondent, Dura-Corp.

Respondent, Dura-Corp. is a Pennsylvania business corporation which, prior to bankruptcy, served as a licensee for Rothbury Investments, Ltd. patented retaining wall products, manufacturing and selling the same in a four state territory from its principal location in New Stanton, Pennsylvania.

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CITATIONS TO OPINIONS AND ORDERS ENTERED IN THE COURTS BELOW

The decisions in the Pennsylvania Supreme Court and the Pennsylvania Superior Court below were not reported. The Opinion and Order of the trial court of December 6, 1996 was reported at 145 Pittsburgh Legal Journal 195 (1997).

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 7, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

U.S. Constitution, Amendment XIV, § 1 provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, Dura-Corp, Inc. (hereinafter "Dura-Corp."), brought a seven count Complaint in the Court of Common Pleas of

Allegheny County against the Petitioners, Rothbury Investments, Ltd. and Risi Stone, Ltd. (hereinafter "Rothbury" or "Risi Stone").

The Complaint alleged that Dura-Corp. and Rothbury were parties to two license agreements which gave Dura-Corp. the exclusive right to manufacture, market, distribute and sell certain concrete retaining wall products in Pennsylvania, Ohio, West Virginia and Maryland. Dura-Corp. alleged that Rothbury improperly terminated the license agreements without giving Dura-Corp. the opportunity to cure a default that had occurred when Dura-Corp. failed to make a required payment on a promissory note due to Petitioner, Risi Stone.

A non jury trial was held in the Court of Common Pleas of Allegheny County, Pennsylvania before the Honorable Richard J. Zeleznik beginning on June 17, 1996 and ending on July 1, 1996. Pursuant to an Order of Court, Dura-Corp. submitted Findings of Fact and Conclusions of Law on September 1, 1996. Petitioners, Rothbury and Risi Stone, also pursuant to an Order of Court, submitted Findings of Fact and Conclusions of Law on October 1, 1996. Thereafter, and without notice to Petitioners, Dura-Corp. filed a Brief on November 13, 1996 which was substantially adopted by the Court in the issuance of its subsequent decision and Opinion.

On December 6, 1996, the Trial Court filed its Opinion and Order of Court. The Court awarded $12,929,900.00 in compensatory damages in the form of lost profits on Dura-Corp.'s breach of contract claims against both Rothbury and Risi Stone and also awarded, *sua sponte*, $3,800,000.00 in compensatory damages on Dura-Corp.'s breach of contract claims against Rothbury alone. The Court also found that Rothbury and Risi Stone were liable for punitive damages of $12,929,900.00.

Prior to its bankruptcy, Respondent, Dura-Corp. was owned, operated and controlled by members of the Eddy family, including Thomas R. Eddy and his two sons, John D. Eddy and Thomas G. Eddy. Thomas R. Eddy, John D. Eddy, and Thomas G. Eddy are all members of the Eddy & Osterman law

firm which represented Respondent, Dura-Corp. in the Trial Court and Appellate Courts. Moreover, while John D. Eddy served as lead trial counsel, his father, Thomas R. Eddy, another member of Eddy & Osterman, served as a principal fact witness for Dura-Corp. His son, Thomas G. Eddy, and brother of principal trial counsel, and another member of Eddy & Osterman, served as the key expert witness on damages at trial. He testified to the alleged $12,929,900 in damages to Dura-Corp. Prior to trial Thomas G. Eddy was not listed as an expert witness, nor was he produced for a deposition as requested. The Trial Court denied the Petitioner's motion to compel Thomas G. Eddy's deposition.

Petitioners, Rothbury and Risi Stone raised below, *inter alia*, the violation of their due process rights pursuant to the Pennsylvania and United States Constitutions. This basis for appeal was raised in the Trial Court in a post-trial motion. This basis for appeal was raised in the Pennsylvania Intermediate Appellate Court, known as the Superior Court, in Appellants' Brief and briefly mentioned in the Superior Court opinion. Finally, the constitutional issue was raised again when Rothbury and Risi Stone filed a Petition For Allocatur in the Pennsylvania Supreme Court which was denied without opinion.

Unfortunately, the apparent *ex parte* contact by opposing counsel and the participation of counsel in the writing of the trial court's nonjury opinion was not confirmed from third party sources to Petitioners' counsel until after the Petition for Appeal had been lodged in the Supreme Court of Pennsylvania. When these after discovered facts were brought to the attention of the Pennsylvania Supreme Court by way of Petitioners' Application For Reconsideration Of Denial Of Allowance Of Appeal, said application was summarily denied without opinion on January 7, 1999.

Petitioners, Rothbury and Risi Stone contend that the following events, considered separately and in their totality, have deprived Petitioners of a fair trial and resulted in a taking of their property without due process of law:

1. The Trial Court received, without notice to Petitioners, Rothbury and Risi Stone, a late filed "Brief for Plaintiff" from which it then substantially took both facts (not of record) and legal conclusions in the drafting of its Opinion in December 1996.

2. At or about the time of the drafting of the Trial Court's Opinion and Order and receipt of the late filed Brief for Plaintiff, there were apparent *ex parte* contacts between the Judge's law clerk and at least one member of the law firm of Eddy & Osterman, counsel for the prevailing party.

3. Thomas G. Eddy, Esquire, of Eddy & Osterman, who apparently had *ex parte* communications with the Judge's law clerk, has subsequently stated to third parties that he participated in the drafting of the Opinion of the Court without notice to Petitioner's counsel.

4. The same counsel who had the *ex parte* contacts with the Court's law clerk and participated in the drafting of the Court's Opinion, was permitted to testify as to damages without prior designation of him as an expert witness and without qualifications to render said testimony, which was ultimately adopted by the Trial Court in a non jury trial, as the exact figure of damages, $12,929,900.00 awarded as compensatory damages against both the Petitioners herein, Rothbury and Risi Stone.

5. Shortly after the decision in the Trial Court, the Trial Judge's law clerk who was improperly contacted *ex parte* by opposing counsel, shared office space with the law firm for the prevailing party (Eddy & Osterman) and served as an attorney for members of that law firm, including Thomas G. Eddy.

6. The law clerk who was improperly contacted *ex parte* by counsel/witness for the prevailing party, is the son of a former Pennsylvania Supreme Court Justice.

7. The above facts were made known to the Pennsylvania Supreme Court, which refused to hear the Petitioner's Appeal or grant reconsideration based upon the after discovered confirmation of this information from third party sources by Petitioners' counsel.

Petitioners, Rothbury and Risi Stone contend that the above facts and circumstances violated their due process rights and right to a fair trial.

REASONS FOR GRANTING THE WRIT

I. PETITIONERS' CONTEND THEIR DUE PROCESS RIGHTS WERE VIOLATED BY IMPROPER *EX PARTE* CONTACTS BETWEEN THE PREVAILING PARTY'S COUNSEL AND THE TRIAL COURT IN THE CONTEXT OF A NON JURY TRIAL, INCLUDING THE "GHOSTWRITING" OF PORTIONS OF THE OPINION, WHERE THE SAME PREVAILING PARTY'S COUNSEL ALSO SERVED AS A KEY EXPERT WITNESS IN THE CASE

The circumstances surrounding the improper *ex parte* contacts by counsel for the prevailing party, Dura-Corp. in this case, as well as the trial court's permission of that same counsel to testify as a key expert witness for the prevailing party on damages, so completely departs from accepted judicial principles so as to constitute a complete and total denial of due process to the Petitioners. Thomas G. Eddy, Esquire, a member of the law firm of Eddy & Osterman, was first permitted to testify as an expert witness without providing an expert report, without qualifications befitting the importance his testimony and after the Petitioners had been denied the opportunity to take his discovery deposition. The

injustice to the Petitioners was compounded by the post-trial actions of attorney Eddy when apparent *ex parte* contacts with the court and its lawclerk began by the late filing of the "Brief For Plaintiff," and then by participation by attorney Eddy in the drafting of the court's opinion without notice to Petitioners' counsel. Such conduct violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

As recognized by this Court, Petitioners, Rothbury and Risi Stone are entitled to fair, impartial due process in this civil matter:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation in dialogue by affected individuals in the decision making process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done, by ensuring that no person will be deprived of his interest in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed. 2d 182 (1980).

While due process is not capable of an exacting definition, the compelling facts of the current case fall well outside any notions of justice promoted by courts in this country. The idea that an attorney for the prevailing party can both testify as a key expert witness on damages, who was not disclosed as such prior to trial,

and then, contact the court *ex parte* and participate in the drafting in the trial court's decision, offends the standard of "fundamental fairness" previously articulated by this Court. Lassiter v. Dept. of Social Services of Durham County, North Carolina, 452 U.S. 18, 24, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640 (1981).

A decision of this Court and other Circuit Court decisions confirm that circumstances such as those present in the case at bar mandate that there was a due process violation in this case and a new trial is warranted. In Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985), this Court set forth certain factors to be considered in the determination of whether the trial court's adoption of findings prepared by the prevailing party violate due process. In Anderson this Court found that the trial court did not "uncritically accept" findings submitted, the trial court previously provided the framework for the proposed findings when it issued a preliminary memorandum, the respondent was provided and availed itself of the opportunity to respond at length to proposed findings, and, the findings ultimately adopted by the trial court varied considerably in both organization and content from those submitted by the prevailing party's counsel. Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573-574, 105 S.Ct. 1504, 1511 (1985).

In the current case, detailed review of the trial court opinion against the lengthy record developed in this case demonstrates that many of the "facts" relied upon by the trial court in its opinion are not from the record. Further, the trial court uncritically accepted findings from the late-filed "Brief For Plaintiff" and adopted, to the penny, the damages award of $12,929,900 submitted by the prevailing party. In fact the very counsel who communicated with the court below in drafting the opinion also testified as an expert witness on damages to that exact figure adopted by the court.

Circuit courts have also considered the drafting of court opinions by counsel for the prevailing party, however, not in the context of the prevailing party's counsel also serving as the key

expert witness who testified in the same case. Nonetheless, these cases, even without an attorney summarizing his own testimony as a witness, have found that due process rights can be violated when counsel for the prevailing party participates in the drafting of the trial court decision.

In Guenther v. Commissioner of Internal Revenue, 939 F. 2d 758 (9th Cir. 1991), the Ninth Circuit found a due process violation where the Commissioner of Internal Revenue had an *ex parte* communication with the court. Significantly, the ex parte communication was a thirty-two page document setting forth the Commissioner's entire view of the case. Id. at 760. This is comparable to the current case where the *ex parte* communications following the nonjury trial apparently began with the submission of the late filed "Brief For Plaintiff" by the prevailing party Dura-Corp. without notice to Petitioners or a meaningful opportunity to respond. Of course in the current case, the impropriety was compounded by the apparent further participation by attorney Eddy of the law firm of Eddy and Osterman in the drafting of the trial court opinion through further improper *ex parte* contacts with the trial courts' law clerk.

It is important to note some of the factors that the Ninth Circuit considered in reversing on due process grounds in Guenther. Specifically, the court in Guenther, found that the *ex parte* thirty-two page submission dealt with substantive issues, and that "the 'facts' of the case are set out in an exquisitely intricate and partisan manner." Guenther, 939 F.2d at 760. The court also found that although the taxpayers had some opportunity to file memoranda rebutting some of the charges, it could not be seriously asserted that the taxpayers had an adequate opportunity to respond to the allegations in the *ex parte* memorandum of the Commissioner. Id. at 760. The court in Guenther thus found a due process violation as the communications went to the merits of the case. Id. at 761. The court further held that the denial of due process rights to the taxpayers entitled them to a new trial before a different judge who was not exposed to the *ex parte* communications. Id. at 762. In the case at bar, review of the partisan language in the trial court's opinion below and comparison to the *ex parte* submission entitled,

"Brief for Plaintiff" similarly compels the finding of a due process violation in the current case.

The Fourth Circuit has also held that the preparation of an opinion by counsel for the prevailing party can be a denial of due process. Ashe v. United States, 288 F. 2d 719, 725 (4th Cir. 1961). The uncritical acceptance of the exact damages figure by the court in the case at bar is also demonstrated by comparison to the Fourth Circuit Court of Appeal's analysis in Aiken County v. BSP Division of Envirotech Corporation, 866 F.2d 661, 677 (4th Cir. 1989) (applying the Anderson Supreme Court factors and noting that the district court below only adopted half of the damages award that was proposed by the prevailing party in its findings of fact and conclusions of law).

Cases involving the drafting of opinions by the prevailing party have also been considered by the Fifth Circuit, Eleventh Circuit and District of Columbia Circuit Courts of Appeals. In each case the appellate courts considered factors similar to those identified by this Court in Anderson Supra. The courts of appeals all indicated their disfavor with the practice and found, based upon mitigating facts not present in the current case, that due process rights were not violated. For example, the District of Columbia Circuit Court of Appeals in Clifford v. United States, 136 F.3d 144 (DC Cir. 1998) found that due process concerns about *ex parte* communications were mitigated where the trial was before a jury and the judge is not the ultimate finder of fact. Clifford, 136 F. 3d at 149. However, in the current case the trial judge was to be the finder of fact in a nonjury trial. Furthermore, reviewing courts normally defer to a trial court's alleged findings of "fact" with an extensive opinion believing them to represent the work of the trial judge. However, to the great prejudice of the Petitioners herein, the many "facts" and partisan characterizations of testimony originated with the prevailing party's counsel in the *ex parte* "Brief for Plaintiff." This placed the Petitioners at a great disadvantage in both the Pennsylvania Superior and Supreme courts as the extreme nature of the *ex parte* contacts in the writing of the opinion were not confirmed by an independent third party source to Petitioners'

counsel until after the appeal of this case was already lodged in the Pennsylvania Supreme Court.

The Fifth Circuit has also indicated its disfavor with the ghostwriting of an opinion. In Keystone Plastics, Inc. v. C&P Plastics, Inc., 506 F.2d 960 (5th Cir. 1975), the court stated:

> This court has consistently expressed its disapproval of the process of unconditionally adopting findings submitted by one of the parties to the litigation. The reviewing court deserves the assurance that the trial court has come to grips with apparently irreconcilable conflicts in the evidence, ... , and has distilled therefrom true facts in the crucible of his conscience.

Keystone Plastics, Inc., 506 F.2d at 962. However, in contrast to the current case, the Fifth Circuit in Keystone Plastics devoted hundreds of hours to the analysis of evidence. Id. at 963. This could not have been done in the current case without a finding that many of the "facts" found by the trial court in its opinion do not even appear in the documents or testimony of record. Moreover, attorney Eddy, as both the witness and the attorney drafting the opinion with the help of the judge's law clerk, comments on his own testimony and in partisan fashion even congratulates himself on how well he handled cross examination. Of course this exact discussion on the effectiveness of Mr. Eddy's testimony at page 21 of the trial court opinion comes word for word from the *ex parte* "Brief for Plaintiff" which is also included in the appendix hereto. This point alone demonstrates the ridiculous and partisan way in which the trial court opinion mimics many of the allegations of the late filed *ex parte* "Brief For Plaintiff" submitted by the prevailing party, Dura-Corp.

Finally, the Eleventh Circuit has on at least two occasions dealt with the issue of *ex parte* communications and ghostwritten opinions. Comparison of the facts of the Eleventh Circuit cases to the facts of the current case demonstrate the procedure in the case at bar was woefully lacking in due process protections to the

Petitioners herein. In In re: Dixie Broadcasting, Inc. v. Radio WBHP Inc., 871 F.2d 1023 (11th Cir. 1989), the court upheld a bankruptcy order submitted by the prevailing party. However, in contrast to the facts at bar, the bankruptcy court in Dixie Broadcasting noted in open court its request to have one party draft an order, the opponent did not request an opportunity to review the draft order or make objections, and, extensive briefing and oral argument were had to correct any possible errors. Id. at 1030. The Eleventh Circuit also found no due process violation in In re: Colony Square Co. v. Prudential Insurance Co. of America, 819 F.2d 272 (11th Cir. 1987). In Colony Square the court found that two salient facts supported affirmance of the draft order. First, the judge had already reached a firm decision before asking the prevailing party to draft the proposed order. Second, the judge's decision followed a number of hearings on the issues where the judge played an active and inquiring role. Moreover, the orders requested were for particular results and discussed specific points already decided by the judge. Id. at 276. In both the Dixie Broadcasting and Colony Square cases the court found, based upon mitigating factors, that the process of drafting the opinion was not "fundamentally unfair." In re: Dixie Broadcasting, 871 F.2d at 1030; In re: Colony Square, 819 F.2d at 276.

In the current case the *ex parte* contacts and the participation in the drafting of the opinion was fundamentally unfair. This is especially true where the same counsel testified as the key expert witness for the prevailing party and the trial court uncritically adopted his figure of $12,929,900 in damages. If the impartiality and lack of critical review is not apparent enough from this fact alone, the trial court's award of the same figure as punitive damages and *sua sponte* award of $3,800,000 in additional damages, both of which were rejected on appeal, further confirms this point.

If it were not for the Pennsylvania appellate courts' deference to the alleged findings of "fact" and evaluation of witnesses supplied by prevailing party's counsel on the underlying $12,929,900 award, it too, surely would have been reversed. Unfortunately, the fact of the *ex parte* drafting of the opinion could

not be brought to the attention of the reviewing courts until the appeal had already been lodged and rejected by the Pennsylvania Supreme Court when Petitioners' counsel learned of this misconduct as confirmed by third party sources to Petitioners' counsel at that time. Counsel for the Petitioners herein brought these facts to the attention of the Pennsylvania Supreme court in their Motion for Reconsideration which was denied without opinion and further complicated by the fact that the law clerk involved in the improper *ex parte* contacts is the son of a former Pennsylvania Supreme Court Justice.

Petitioners contend the process in this case so far departed from the accepted and usual course of judicial proceedings that their due process rights were violated and the exercise of this Court's supervisory power is necessary. Moreover, a new trial is warranted before a judge who was not involved in the previous proceedings to assure due process for the Petitioners herein because the Pennsylvania courts were either unable due to the deception of the prevailing party's counsel, or unwilling to address the grievous violation of Petitioners due process rights. In short, Petitioners last hope is for this Court to exercise its jurisdiction by granting a writ of certiorari to the Pennsylvania Supreme Court.

CONCLUSION

For the foregoing reasons, Petitioners, Rothbury Investments, Ltd. and Risi Stone, Ltd. Respectfully request that this Court grant its Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

DURA-CORP., a Pennsylvania business corporation,	:	Nos. 321 & 322 W.D. Allocatur Docket 1998
Respondent	:	Application for Reconsideration of Denial
v.	:	of Allowance of Appeal
ROTHBURY INVESTMENTS, LTD., a Canadian corporation, and RISI STONE, LTD., a Canadian corporation,	:	
Petitioners	:	
Cross-Petitioner: DURA-CORP.	:	

ORDER

PER CURIAM:

AND NOW, this 7th day of January 1999, the application for reconsideration of denial of allowance of appeal is **Denied**.

A True Copy Patricia Honard
As of: January 7, 1999
Attest: /s/ Patricia Honard
Chief Clerk
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

DURA-CORP., a Pennsylvania business corporation,	:	Nos. 321 & 322 W.D. Allocatur Docket 1998
Respondent	:	Petition for Allowance of Appeal from the Superior
v.	:	Court
ROTHBURY INVESTMENTS, LTD., a Canadian corporation, and RISI STONE, LTD., a Canadian corporation,	:	Cross-Petition for Allowance of Appeal
Petitioners	:	Motion for Leave to File Motion to Disqualify Counsel Under Seal
Cross-Petitioner: DURA-CORP.	:	

ORDER

PER CURIAM:

AND NOW, this 6th day of November, 1998, the petition for allowance of appeal, the cross-petition for allowance of appeal and the motion for leave to file motion to disqualify counsel under seal are denied.

A True Copy Patricia Honard
As of: November 6, 1998
Attest: /s/ Patricia Honard
Chief Clerk
Supreme Court of Pennsylvania

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

DURA-CORP., a Pennsylvania business corporation	:	
v.	:	
ROTHBURY INVESTMENTS, LTD., a Canadian corporation, and RISI STONE, LTD., a Canadian corporation,	:	
Appellants	:	No. 273 PITTSBURGH, 1997
- - - - - - - - - - - - - - - - - - - -	:	
DURA-CORP., a Pennsylvania business corporation,	:	
Appellant	:	
v.	:	
ROTHBURY INVESTMENTS, LTD., a Canadian corporation, and RISI STONE, LTD., a Canadian corporation	:	No. 361 PITTSBURGH, 1997

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment. of the Court of Common Pleas of ALLEGHENY County be, and the same is hereby VACATED AT NUMBER 273 PITTSBURGH 1997 AND AFFIRMED AT NUMBER 361 PITTSBURGH 1997.

BY THE COURT:

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: February 2, 1997

J. A44034/97

DURA-CORP., a Pennsylvania business corporation	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ROTHBURY INVESTMENTS, LTD., a Canadian corporation, and RISI STONE, LTD., a Canadian corporation,	:	No. 0273 Pittsburgh, 1997
Appellants	:	
DURA-CORP., a Pennsylvania business corporation,	:	
Appellant	:	
v.	:	
ROTHBURY INVESTMENTS, LTD., a Canadian corporation, and RISI STONE, LTD., a Canadian corporation	:	No. 0361 Pittsburgh, 1997

Appeal from the Judgment entered January 21, 1997, Court of Common Pleas, Allegheny County, Civil Division at No. GD 90-21096.

BEFORE: TAMILIA, JOHNSON and BROSKY, JJ.

MEMORANDUM: FILED: FEBRUARY 2, 1998

In these cross appeals, we are asked to consider allegations of breach of contract and wrongful termination of a license held by Dura-Corp., Inc. (Dura Corp) to manufacture, sell and install retaining wall systems made from the processes designed and patented by Rothbury Investments Ltd. (Rothbury), and Risi Stone Ltd. (Risi Stone) (collectively "the defendants"). Dura Corp also

claimed that the defendants tortiously interfered with its contractual relations.

This case has a lengthy history which we will attempt to condense for our purposes. The defendants are Canadian corporations owned and operated by the Risi family of Ontario, Canada. They own the patents for certain dry-cast concrete retaining wall systems. Dura Corp, a Pennsylvania corporation, was created to manufacture, sell, and install these retaining walls in a four-state area. Mr. Thomas R. Eddy, the president and chief executive officer of Dura Corp, entered into an exclusive licensing agreement with the Risis for their products in November 1983. These products were known by the registered trademarks of "Dura-Hold" and "Dura-Crib."

After obtaining the exclusive license, Mr. Eddy purchased equipment and constructed a manufacturing plant in New Stanton, Pennsylvania. The cost of this construction was approximately $1.3 million dollars, and Mr. Eddy personally financed the construction by loaning the funds to Dura Corp. Production commenced in June 1986. Because this was the first plant of its kind, production initially encountered many difficulties. Dura Corp eventually resolved the production problems and began an intensive marketing campaign. An important part of this marketing was the acquisition of Pennsylvania Department of Transportation (PennDOT) approval in March 1989 for the use of their products in PennDOT's flood control and erosion projects.

Mr. Eddy remained the main source of financing for Dura Corp throughout this time; however, in an effort to obtain outside financing, Dura Corp prepared a business plan and presented it to Gateway Financial Group ("Gateway"), a venture capital company. Gateway made an oral commitment to Dura Corp to supply $2 million in the form of investment capital. While the agreement between Gateway and Dura Corp was being finalized, Rothbury revoked Dura Corp's license.

The April 3, 1990, letter that revoked Dura Corp's license stated that the reason for Rothbury's revocation was Dura Corp's

failure to make a $29,000 payment owed to Risi Stone. Dura Corp offered to make this payment on April 24, 1990, conditioned upon Rothbury's reinstatement of the licensing agreement. Rothbury refused. On April 25, 1990, Rothbury informed one of Dura Corp's customers that Dura Corp's license had been terminated. Additional letters to other customers, including PennDOT, followed. The letters stated that customers could now purchase all Risi Stone patented products only from Rothbury through its new Virginia supplier. As a result of the termination, Gateway withdrew its offer to supply $2 million to Dura Corp. Dura Corp was subsequently forced into involuntary bankruptcy.

Dura Corp filed a complaint against Rothbury and Risi Stone alleging, inter alia, breach of contract and tortious interference with business relations. The defendants filed counterclaims against Dura Corp alleging breach of contract, unjust enrichment, and trademark violations. Both parties filed motions for summary judgment. After a hearing, the trial court granted Dura Corp's motion for partial summary judgment, finding that the defendants breached the contract between the parties. The court denied the defendants' motion. Both parties appealed this determination to this Court, and we affirmed the partial grant of summary judgment in Dura Corp's favor by a Memorandum Opinion. *Dura Corp, Inc. v. Rothbury and Risi Stone*, 431 Pa.Super. 625, 631 A.2d 220 (1993) (table).

The Honorable Richard G. Zeleznik then conducted a bench trial on the damages issue in relation to the breach of contract claim and also on the remaining issues in Dura Corp's complaint. Thereafter, Judge Zeleznik awarded Dura Corp $12,929,900.00 in damages on the breach of contract action jointly and severally against Risi Stone and Rothbury, awarded $3,800,000.00 in compensatory damages against Rothbury alone, and awarded $12,929,900.00 in punitive damages against the defendants jointly and severally. After a hearing on post-verdict motions, Judge Zeleznik vacated the punitive damages award because no evidence of either defendants' net worth was presented at trial. The court denied the post-verdict motions in all other respects. These cross-appeals followed.

The Defendants' Appeal at No. 0273 Pittsburgh 1997

The defendants allege several trial court errors, namely that: (1) the court erred in awarding compensatory damages on the breach of contract action because Dura Corp had consented to a non-suit on their breach of contract claim; (2) the evidence was insufficient to support the award of lost profits; (3) the court erroneously based its damage award on improper hearsay testimony; (4) the court improperly permitted Thomas G. Eddy, Jr. to give an expert opinion in the case; (5) the evidence was insufficient to support an award on the tortious interference claim; (6) Dura Corp failed to mitigate its damages; (7) the court improperly awarded $3.8 million in compensatory damages because this figure was neither pleaded nor proven by Dura Corp; and (8) the multiple and fundamental errors of law as stated above amount to a denial of the defendants' due process rights.

The defendants first argue that the court erred in awarding damages for breach of contract because Dura Corp had consented to a non-suit on their breach of contract claim. The breach of contract claim was contained in count 6 of a 7-count complaint. At the close of Dura Corp's case in chief, counsel for the defendants presented a motion for a compulsory nonsuit in relation to several of the original counts. N.T., June 21, 27, and 28, 1996, at 794. The parties agreed that count 3 (specific performance), count 5 (injunction), and count 7 (rescission) were not proven and were no longer at issue. *Id.* at 795. The following then transpired with regard to count 6 (breach of contract):

> Mr. Kenrick [attorney for the defendants]: And then, Your Honor, again, I'm asking, but I didn't hear any proof of Count 6, which is a breach of contract count involving Dura-Hold II and a claim that we didn't provide mold drawings. In fact, the only testimony in the record was that mold drawings were provided. Again, so we can address ourselves to that, if necessary.

> Mr. Eddy [counsel for Dura Corp]: No, we would concede that that is correct.

Id. The defendants allege that by this concession Dura Corp agreed to a non-suit of their breach of contract claim. Shortly after this exchange, court recessed for the day, and, when it was back in session, the following transpired:

> Mr. Eddy: We agreed, on Friday, I believe it was, that we were here last, that two of the counts, and Mr. Kenrick may correct me if I'm wrong, were basically moot. . . . I believe we also agreed to the compulsory dismissal of the count, it is Count 6, Mr. Kenrick, that deals with a breach of contract for some relatively minor matters which we did not feel like belaboring the Court with during this trial. So we basically put no evidence on is support thereof. I believe it was Count 2.

Id. at 820. Thereafter, the following took place:

> Mr. Kenrick: . . . The other one was we moved for a compulsory nonsuit with respect to their claim for contract damages arising out of the premature attempted termination of the contract on the basis generally speaking that they didn't prove causation and they didn't prove damages with the required level of specificity under Pennsylvania law. So those were the items that were contested, as I remember it, after Friday and for which we would request the Court to rule and indicate its statement of reasons as to why or why not a prima facie case was made out. . . .

Id. at 822. After reading the transcripts in their entirety in regard to the non-suit motion, it is clear to this Court that the only matter that Dura Corp agreed to have dismissed was the claim regarding the defendant's alleged breach of contract for failing to provide the mold drawings. Moreover, it is clear from the final excerpted

exchange that the defendants' counsel was also under the impression that the breach of contract claim was still viable and that Dura Corp had not agreed to its dismissal. This Court finds it highly unlikely that a plaintiff would agree to a non-suit of the major contention in its complaint after years of preparation, several days of testimony, and the successful grant of a partial motion for summary judgment. We will not grant the defendants any relief on this issue.

Next, the defendants maintain that the evidence at trial was insufficient to prove Dura Corp's lost profits. Our standard of review in a case dealing with the trial court's award of damages is well established.

> "[T]he findings of a trial court sitting without a jury have the same force and effect on appeal as a jury's verdict. We will reverse the trial court only if its findings are predicated upon an error of law or are unsupported by competent evidence in the record. On review, it is not within our province to find facts or to substitute our judgment for that of the trial court. Moreover, the trial court is free to believe all, part, or none of the evidence presented, to make all credibility determinations, and to resolve any conflicts in the evidence."

Scobell Inc. v. Schade, 455 Pa.Super. 414, 420, 688 A.2d 715, 718 (1997), quoting *Hodges v. Rodriguez*, 435 Pa.Super. 360, 366, 645 A.2d 1340, 1343 0 994) (internal citations omitted). Moreover, in reviewing the trial court's findings, we must view the evidence in the light most favorable to the prevailing party below. *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa.Super. 90, 114, 464 A.2d 1243, 1255 (1983).

When reviewing a claim for damages relating to lost profits, we note that

> [d]amages for lost profits, like other contract damages, may not be awarded when the evidence

> leaves the trier of fact without any guideposts except his or her own speculation. Sufficient evidence must be introduced to permit a reasonably certain estimate of the amount of anticipated profits lost due to the breach.

Merion Spring Co. v. Muelles Hnos. Garcia Torres, 315 Pa.Super. 469, 486, 462 A.2d 686, 695 0 983). When dealing with an established business, a claim for lost profits is relatively easy to prove without involving the fact-finder's speculation. When dealing with a new business, however, proof of lost profits is more difficult to obtain and present. *Id.* at 487, 462 A.2d at 696. Yet, such proof is not impossible to obtain.

> Because there is no business history from which to reasonably predict subsequent events, the evidence must be substantial and it must be shown to have a close relationship to the individual firm in question as well as the relevant economic and financial conditions prevailing at the time the losses occurred. As the Restatement, Second, suggests, lost profits from a new business
>
> > may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analysis, business records of similar enterprises, and the like. Restatement, Second, § 352, Comment b.
>
> *See also* Restatement § 331, Comments b and d, Illustrations 6 and 8.

Id. at 488, 462 A.2d at 696. In the present case, therefore, the crucial question becomes whether Dura Corp put on the record sufficient credible information to permit a reasonable estimate of its lost profits. "Because damages in the nature of lost profits are difficult to establish with mathematical certainty, only reasonable certainty will be required." *Scobell, supra*, at 421, 688 A.2d at 719;

see also Delahanty, supra. "In reviewing the award of damages, the appellate courts should give deference to the decisions of the trier of fact who is usually in a superior position to appraise and weigh the evidence." *Delahanty, supra,* at 118, 464 A.2d at 1257.

Here, the trial court awarded Dura Corp almost $13 million in compensatory damages for its profits lost due to the defendants' breach of contract. Dura Corp's evidence regarding its lost profits included the business plan formed by Dura Corp to attract potential investors immediately prior to the defendants' breach, as well as testimony from several witnesses.

Gary Hoffman, chief executive officer of PennDOT, testified about PennDOT's approval of the Dura Corp product Dura Hold. N.T., June 19-20, 1996, at 326. Hoffman stated that several PennDOT districts were interested in using Dura Hold in their construction projects. *Id.* at 335-36. The Dura Hold product was listed as an available alternate for the gabion baskets that were extensively used in PennDOT projects requiring flood control measures or retaining walls. *Id.* at 331, 341-45.

Robert L. Sill, Jr. testified about the extensive marketing efforts that he and his company put into the Dura Corp products. *Id.* at 501-12. Sill also stated that the potential market for building and maintaining retaining walls in Pennsylvania was approximately $32.5 million a year. Id. at 534.

The bulk of the testimony about Dura Corp's lost profits was elicited from Thomas G. Eddy, an officer of Dura Corp, and Alvin Catz, an expert in accounting and finance. Thomas G. Eddy is an attorney with undergraduate degrees in economics and finance. N.T., June 21, 27-28, 1996, at 682. He has also partially completed courses in support of an MBA degree. *Id.* at 683. Eddy prepared the financial analysis and projections portion of Dura Corp's business plan. *Id.* at 688. Eddy testified that he used actual company records to perform a volume cost profit analysis for the Dura Corp business plan. *Id.* at 690-91. When preparing the business plan, Eddy performed a five-year projection of sales and profits according to a trend line analysis. *Id.* at 692-93. This

analysis projects the mean rate of growth of a business. *Id.* at 695. In preparation for trial, Eddy extended this analysis through the life of the licensing agreement, or through the year 2003. *Id.* at 700. He then discounted the analysis to a present value. *Id.* at 701. This resulted in a figure of $12,929,900.00. *Id.* at 720. This was a "gross profit figure." *Id.*

Alvin Catz, a management consultant, gave expert testimony for Dura Corp. Catz reviewed the Dura Corp business plan prepared by Eddy and testified that the business plan was very well done and appropriate for a relatively new business venture to use as a vehicle for attracting investors. N.T., June 19-20, 1996, at 642. Catz stated that the preparation and display of the information in the business plan followed appropriate accounting principles. *Id.* at 646-48. Further, Catz stated that the trend line analysis is a valid method of forecasting the future profits of a company. *Id.* at 648.

The defendants argue that this testimony is insufficient to support the award of lost profits in this case. We disagree. We stress that it is not this Court's function to weigh the evidence anew and substitute our judgment for that of the trial judge sitting as a fact finder. *Scobell, supra.* In addition, we view the evidence in the light most favorable to Dura Corp as the verdict winner below. *Delahanty, supra.* After review, we conclude that sufficient, competent evidence supports the trial court's award of damages in this case. *See Merion Spring, supra* (holding that the personal knowledge of a company's general manager supported his calculations of the company's lost profits and was sufficient to support the court's award of damages even though the facility had never operated due to the defendant's breach of contract).

The defendants also assert that the damage award is improper because it is based upon hearsay testimony. The defendants argue that the business plan was written in part by unidentified individuals who were not available for cross-examination. The only part of the business plan relevant to the lost profits issue, however, is that portion testified about by Thomas G. Eddy. Eddy was the exclusive author of this portion of the document. N.T., *supra*, at 689. The defendants extensively cross-

examined Eddy about the plan at trial. *Id.* at 720-87, 791-94. Thus, even if the remainder of the business plan contained hearsay statements, any error relating to its admission into evidence is harmless.

In their next assault on Mr. Eddy's testimony, the defendants maintain that he was improperly permitted to give an expert opinion in this case without preparation of an expert report. Although the Pennsylvania Rules of Civil Procedure do not define the term "expert," a definition appears in the Allegheny County Local Court Rules that is applicable here. Local Rule 212 defines "expert" as "any witness who has special knowledge, skill, experience, training or education in a particular science, profession, or occupation, whom a party intends to call to express an opinion." Eddy was not qualified as an expert at trial because his testimony did not relate to any special skills or education. Rather, Eddy testified as to matters within his personal knowledge. He stated his educational background and the reasons for the conclusions that he had made in the report, but this is not the equivalent of "expert testimony." *See Merion Spring, supra.* We are persuaded by the trial court's analysis on this point, "'[t]he witness may state relevant facts known to him, because of experience, even though he is not regarded as an expert. . . .'" Trial Court Opinion, December 6, 1996, at 22, quoting *Commonwealth v. Harris*, 186 Pa.Super. 59, 63, 140 A.2d 344, 345 (1958). Thus, Eddy was not required to prepare an expert report prior to trial, and the court did not err in admitting Eddy's testimony.

The defendants next maintain that the evidence was insufficient to support the conclusion that they tortiously interfered with Dura Corp's contractual obligations. A cause of action of this type may be found for interference with either existing or prospective contractual relations. *See Cloverleaf Development, Inc. v. Horizon Financial F.A.*, 347 Pa.Super. 75, 500 A.2d 163 (1985) (prospective contractual relations) and *Al Hamilton Contracting Co. v. Cowder*, 434 Pa.Super. 491, 644 A.2d 188 (1994) (existing contractual relations). Both torts apply to the instant case.

To establish a cause of action for intentional interference with an existing business relationship, it must be alleged that (1) there is an existing contractual relationship between the plaintiff and a third party; (2) the defendant interfered with the performance of that contract by inducing a breach or otherwise causing the third party not to perform; (3) the defendant was not privileged to act in this manner; and (4) the plaintiff suffered losses as a result of the breach. *Hamilton*, *supra*, at 497, 644 A. 2d at 191. In this case, Dura Corp established that they had a contractual agreement with Gateway; when Dura Corp needed outside investors, Gateway agreed to purchase $2 million worth of stock in exchange for a large return in their investment. N.T., June 19-20, 1996, at 418-24. After Dura Corp lost their license to manufacture the defendant's products, Gateway backed out of its agreement to invest. *Id.* at 424.

We conclude that Dura Corp established that a contract existed between itself and Gateway, and that the defendants' actions caused Gateway not to perform on the contract. We also have no difficulty in finding that Dura Corp was harmed by the breach of the contract with Gateway, as Dura Corp was forced into involuntary bankruptcy soon after the events in question here. The defendants argue that Dura Corp did not establish that the defendants' were not privileged to act as they did. The defendants' lack of privilege or justification to act in the manner that they did is "'merely another way of stating that the defendant's conduct must be improper.'" *Cloverleaf Development*, *supra*, at 83, 500 A.2d at 167, quoting *Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Division*, 281 Pa.Super. 560, 581 n.11, 422 A.2d 611, 622 n.11 (1980). Where the defendant acts in part for the purpose of protecting a legitimate interest, the court must evaluate the competing interests involved. What is or is not privileged conduct is not easily susceptible to a precise definition. *Id.*

Here, the defendants' former attorney, Mr. James A. Escovitz, testified that he advised Rothbury that it had the right to terminate the contract after Dura Corp failed to make the necessary payment. N.T., June 28, 1996, at 908. As stated above, however, there is no precise definition of what constitutes privileged conduct and what conduct is considered improper. *Cloverleaf Development*,

supra. In this case, Judge Zeleznik considered all the testimony regarding the defendants' actions surrounding the breach of licensing agreement, and found that the defendants' conduct was improper. Viewing the evidence in the light most favorable to the prevailing party below, *Delahanty*, *supra*, we find that the conclusion that the defendants tortiously interfered with Dura Corp's contractual relationship with Gateway is supported by the evidence. Accordingly, we will not grant the defendant's relief on this issue.

In a cause of action for interfering with *prospective* contractual relations, the complaint must allege (1) a prospective contractual relationship between the plaintiff and third parties, (2) a purpose or intent to harm the plaintiff by preventing the relationship from accruing, (3) the absence of privilege or justification for the defendant's actions; and (4) a resulting actual harm or damage to the plaintiff. *Cloverleaf Development*, *supra*, at 82, 500 A.2d at 167. Here, the evidence presented was overwhelming regarding the defendants' actions in connection with Dura Corp's potential customers. The defendants sent letters, dated November 30, 1990, to more than 200 of Dura Corp's actual or potential customers. These letters stated that Dura Corp's license had been terminated and that franchise rights had been transferred to another named company. Dura Corp's customers never returned. We agree with the trial court that the prospective customers and their prospective contracts were reasonably proven in this case. Dura Corp established reasonable estimates of PennDOT business, as well as inferences regarding existing customers and their future sales. We therefore conclude that the defendants are not entitled to relief on this issue.

The defendants next claim that Dura Corp has failed to mitigate its damages. The defendants base this claim on Dura Corp's failure to timely tender the missed payment that was the basis for the defendants' termination of Dura Corp's license. This claim, however is wholly without merit. The evidence established that Dura Corp and the defendants were not in agreement as to the legal effect of the letter purporting to terminate the license agreement. The parties attempted to negotiate a settlement of their

differences, and, as part of this negotiation, Dura Corp offered to tender the funds in question. These negotiations failed and the result of this failure is the present lawsuit. We will not construe this as a failure on Dura Corp's part to mitigate damages.

The defendants also claim that the court erred in awarding Dura Corp $3.8 million dollars in restitution damages. The defendants assert that these damages were not pleaded by Dura Corp. This claim is belied by the record. *See* Complaint, dated December 11, 1990, ¶ 9. However, the defendants are correct that the testimony at trial established that this sum represents the personal losses of Thomas R. Eddy. Mr. Eddy testified that he expended approximately $3.8 million of his own funds in preparing Dura Corp for production. N.T., June 17 & 18, 1996, at 96-98. In effect, this sum represents Mr. Eddy's capital investment into Dura Corp. It is without question that a corporation is a distinct and separate entity from its shareholders. *See Glazer and Leader Industries, Inc. v. Cambridge Industries, Inc.*, 281 Pa.Super. 621, 625, 422 A.2d 642, 644 (1980). The loss of this capital investment is therefore Mr. Eddy's, and cannot be attributed to the corporation. Because Mr. Eddy is not a party to this action, these damages cannot properly be recovered by Dura Corp in this suit. We therefore conclude that it was improper for the court to award Dura Corp these restitution damages. Accordingly, we will vacate this portion of the award.

As their final issue, the defendants claim that the multiple and fundamental errors of law that occurred at trial amount to a denial of their due process rights. We have found that all of the previous issues, except the claim regarding the $3.8 million award as stated above, lack merit. Some of the defendants' issues border on being frivolous, and the award concerning the only meritorious issue is vacated by this Memorandum. Accordingly, this claim need not be further entertained.

Dura Corp's Appeal at No. 0361 Pittsburgh 1997

Dura Corp appeals from the trial court's decision to vacate the award of punitive damages against the defendants. Initially, the

trial court found that the defendants' conduct was so outrageous and egregious as to justify a punitive damage award in the amount of $12,929,900.00. After reviewing the defendants' post-verdict motions, however, the court vacated the punitive damage award because no evidence of the defendants' net worth was admitted at trial.

Punitive damages in Pennsylvania are awarded pursuant to the standards enunciated in the Restatement (Second) of Torts, Section 908(2), which provides:

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

"[T]he purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others from similar conduct[.]" *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 103, 555 A.2d 800, 803 (1989).

Here, the trial court found that the defendants' conduct was "flagrant, outrageous and in wanton disregard of plaintiff's rights[.]" Opinion, *supra*, at 28. We find that this determination has support in the record and is therefore not an abuse of discretion. *Scobell, supra*. However, an award of punitive damages is not justifiable solely on the basis of outrageous conduct. As our supreme court has stated,

> [t]he wealth of the tortfeasor is relevant. In making its determination, the jury has the function of weighing the conduct of the tortfeasor against the amount of damages which would deter such future conduct. In performing this duty, the jury must

> weigh the intended harm against the tortfeasor's wealth.

Kirkbride, *supra*, at 103, 555 A.2d at 803. *Accord Sprague v. Walter*, 441 Pa.Super. 1, 61, 656 A.2d 890, 920 (1995) ("It is well-settled that when punitive damages are at issue in a case, the jury must consider not only the character of the act underlying the claim and the harm suffered by the plaintiff, but also the wealth of the defendant."). Here, Dura Corp did not proffer evidence regarding the defendants' wealth or net worth. Accordingly, the court could not, as it must, weigh the evidence to determine what amount of punitive damages would properly punish the offensive conduct and serve as a deterrent to the defendants ever acting in such a way again. Thus, the court did not err in vacating the punitive damage award.

Based upon the foregoing, we hereby vacate the award of $3.8 million in restitution damages because this sum represents the losses incurred by Mr. Eddy personally. In all other respects, we affirm the trial court's order of January 21, 1997.

Appeal at No. 0273 Pittsburgh 1997: The award of $3.8 million in restitution damages is **VACATED**. In all other respects, the Order is **AFFIRMED**.

Appeal at No. 0361 Pittsburgh 1997: **AFFIRMED**.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

DURA-CORP, a Pennsylvania business corporation,

Plaintiff,

v.

ROTHBURY INVESTMENTS, LTD., a Canadian Corporation, and RISI STONE, LTD., a Canadian corporation,

Defendants.

G.D. 90 - 21096

Code: 011 Multiple Civil Actions

OPINION and ORDER OF COURT

Zeleznik, J.

Copies sent to all Counsel of record

Zeleznik, J.

This case involves the breach of contract/wrongful termination of the plaintiff's license to manufacture, sell and install several of the defendants' patented products, primarily dry-cast concrete retaining wall systems, the subsequent tortious interference with contractual relations, and the lost profits which resulted and flowed therefrom. The defendants, Rothbury Investments, Ltd. (hereinafter referred to as "Rothbury") and Risi Stone, Ltd. (hereinafter referred to as "Risi Stone") are two Canadian corporations owned and operated by the Risi family of Ontario, Canada. The liability of defendant Rothbury was determined by Allegheny County Common Pleas Judge Louis Farino on a Motion for Summary judgment which held that said defendant did breach the parties' contract. judge Farino's decision was upheld by the Superior Court of Pennsylvania (No. 624 PGH 1992) and a trial was then held before this Court 1) to determine the damages sustained by plaintiff as a result of the Rothbury's breach of contract and (2) to determine whether or not defendants Rothbury and Risi Stone maliciously/tortiously interfered with the plaintiffs contractual relations and, if answered in the affirmative, what measure of damages if any should be awarded plaintiff for such interference.

A closely condensed chronological statement of the facts necessary to be known and the conclusions of law are hereinafter set forth in narrative form as follows.

Factual Background

The plaintiff Dura-Corp, a Pennsylvania corporation, was incorporated in September, 1984 by Mr. Thomas R. Eddy, its president and chief executive officer. Prior to incorporating Dura-Corp, Mr. Eddy had extensive business experience in construction, mining and real estate development. Dura-Corp was created for the sole purpose of manufacturing, selling and installing certain patented, concrete retaining walls. Sometime during the summer of 1983, Mr. Eddy met Angelo Risi who, along with his brother

Antonio Risi, owned a Canadian patent for a concrete retaining wall system. At that time a patent was pending in the United States for the same system. In November of 1983, Mr. Eddy, the Risis and one Ken Dehus entered into an exclusive licensing agreement for the four state area comprised of Pennsylvania, Ohio, West Virginia and Maryland, which licensing agreement was ultimately assigned to Dura-Corp. The licensing agreement gave the licensees the right to manufacture and distribute certain products embodying the Risi patent. These products were known by the registered trademarks of "Dura-Hold" and "Dura-Crib".

In December of 1983, Mr. Eddy made a trip to Germany with Angelo Risi to inspect certain specialized manufacturing equipment. Eventually a Hess Hydromat Model 250, which was capable of producing the various patented retaining wall blocks, was purchased by Mr. Eddy as a result of the trip to Germany. The approximate cost of the Hess machine was $200,000.00. Mr. Eddy also financed the processing of the Risis' United States patent which was pending, and- ultimately succeeded in obtaining a United States patent on December 25, 1984. The said patent and other intellectual property rights incidental thereto were immediately assigned to Rothbury. A manufacturing plant in New Stanton, Pennsylvania (the geographical center of Dura-Corp's exclusive marketing area) was purchased by Dura-Corp in May of 1985. After structural modifications and necessary additions to the plant, the cost to Dura-Corp was approximately $1.3 million. At this point all funding had been personally supplied by Mr. Eddy in the form of loans to Dura-Corp. By June of 1986, the manufacturing plant was ready to run and production of Dura-Hold and Dura-Crib commenced. The Dura-Corp plant was a prototype operation and as such, several production problems were encountered over the next two year period. However, all of the problems were successfully resolved by Dura-Corp personnel. A marketing program was instituted by Dura-Corp in 1986 which included studies of competing products, mass mailings, advertising in trade catalogs, personal contacts with prospective purchasers and users, and the development of an accepted method for dealing with governmental agencies which could utilize Dura-Corp's products. This marketing effort led to the Pennsylvania Department of

Transportation's adding Dura-Hold to a list of accepted alternatives for retaining wall systems. PennDOT especially had a need for such products due to the 54,000 miles (in Pennsylvania alone) of stream banks which could potentially require erosion or flood control work. Securing PennDOT approval in March of 1989 was the result of an intensive two year, $500,000.00 investment by Dura-Corp and was a critical achievement because it opened the door to having similar approval in surrounding states.

In 1987, the stockholders of Dura-Corp (including Angelo and Antonio Risi) were made aware at an annual meeting of the company's need for an infusion of investment capital. Various attempts were made by Dura-Corp between 1987 and 1990 to obtain financing from some source other than Mr. Eddy who was beginning to feel the pinch created by the substantial expenditure of funds which had by then persisted for a period of four to Five years. In furtherance of their search for financing, Dura-Corp created a business plan, the format of which was approved by a duly qualified expert, Alvin Katz. A Dura-Corp officer, Thomas Eddy, Jr., who had an academic background in business finance and management accounting as well as being a practicing attorney, supplemented the plan with research and projections derived therefrom. This plan showed projected profits through the life of Rothbury's patents in a discounted sum of $12,900,000.00. As such, a source of outside financing was obtained from Gateway Financial Group, (hereinafter "GFG"), a venture capital company whose members included personal friends and more importantly former business associates of Mr. Eddy. GFG made an oral commitment to Dura-Corp to supply the sum of $2 million in the form of investment capital to alleviate Dura-Corp's immediate financial dilemma and to provide capital for advertising and plant expansion. It is important to point out that by the terms of their oral agreement, the GFG proceeds could not have been used to reimburse Mr. Eddy for any loans he made to the corporation, but only for outside creditors. On April 3, 1990, while a written document was in tile process of being prepared to memorialize the oral agreement between GFG and Dura-Corp, Rothbury wrote a letter revoking Dura-Corp's franchise, ostensibly because Dura-Corp had failed to pay a $29,000.00 debt owed to Risi Stone. On

April 24, 1990, in addition to notifying Rothbury of its interference with Dura-Corp's attempts at seeking outside financing, Dura-Corp attempted to salvage the situation by offering to pay the sum of $29,000.00 to Risi Stone on the condition that Rothbury retract the termination notiee. Said offer was summarily and repeatedly refused by Rothbury. On April 25, 1990, Rothbury informed Site Control Systems, a Dura-Corp customer, that Dura-Corp's license had been terminated. On May 30, 1991, Rothbury similarly advised Dura Sales, another of Dura-Corp's distributors. Said distributors were instructed to purchase all Risi patented products from Rothbury which had created a supplier relationship with a manufacturing facility in Virginia. In August of 1990, As a direct result of Rothbury's franchise termination, GFG withdrew its offer to supply $2 million to Dura-Corp.

At the time of its franchise termination, Dura-Corp had received from Thomas R. Eddy over $3.8 million in loans used to acquire and renovate the manufacturing plant and to operate for the first 5 years of its existence. Within eight months following the revocation of Dura-Corp's franchise and while bankruptcy loomed, defendants generated another letter dated November 30, 1990 which was sent to over 200 of Dura-Corp's actual or potential customers including its largest and most important, Allegheny County. This letter informed its recipients that Dura-Corp's patent license had been revoked and that another entity, Camber Corporation, was the new licensee. Three months later, in February of 1991, Dura-Corp was forced into involuntary bankruptcy.

Questions involved

As previously stated, this was an action for damages allegedly resulting from a breach of contract and to determine whether defendants tortiously interfered with the contractual relations of plaintiff and if so, what measure of damages plaintiff should be awarded. After a careful review of all the evidence and testimony presented at trial, the parties' proposed findings of fact and conclusions of law and their supplemental briefs, the Court finds the following to be the questions involved:

1. Whether or not Rothbury's breach of contract entitles the plaintiff to recover the following items of damage:

   a. damages in the form of lost investment capital from potential investors;

   b. damages in the form of lost profits projected over the period of time encompassed by the Successor Licensing Agreement;

   c. damages sustained by the plaintiff for expenditures made, and in property which plaintiff made, transferred or consumed in reliance on the contract.

2. Whether or not defendants Rothbury and Risi Stone maliciously/tortiously interfered with plaintiff's contractual relations.

3. Whether or not defendants' malicious/tortious interference with contractual relations entitles plaintiff to recover the following items of damage:

   a. damages for defendants' malicious interference with plaintiff's distributor contracts;

   b. damages in punitive form for defendants' outrageous and malicious conduct following the revocation of Dura-Corp's license by;

      (1) wrongfully informing Dura-Corp's product distributors and customers that Dura-Corp no longer had the right to manufacture or sell products encompassed by, the Risi patents, and that said rights had been granted to another entity; and/or

      (2) encouraging and directing Dura-Corp's distributors to purchase Rothbury's patented products made at the Virginia manufacturing plant.

Lost investment capital from potential investors GFG

Both parties to the oral agreement with GFG admit that there was an oral agreement, and it was not reduced to writing, not because there were material terms still to be negotiated, but because Rothbury terminated the licenses and eliminated any reason for the GFG or Dura-Corp to produce a written document. Plaintiff's entire existence depended on the terminated licenses. The issue here is not whether there was an enforceable oral agreement, but whether it is likely that the GFG investment would have been consummated but for the termination of the licenses by, Rothbury. Mr. Samuel Zacharias, a member of GFG's board of directors, gave testimony at trial which supports this Court's finding that [he investment by GFG would have been made, had it not been for Rothbury's actions:

> "After the commitment had been made to invest, we were informed by Mr. Eddy of the loss of the license to manufacture. We hung on, hoping that could be negotiated. It never was. We never made an investment."

The Court finds that the failure of the parties to consummate the proposed GFG investment was due solely to the defendants' wrongful termination of the plaintiff's licenses. Rothbury asserts the defense that the parties never fully completed their negotiations. The record is clear that the failure resulted from Rothbury's own wrongful conduct and a transgressor (Rothbury) cannot be allowed to profit from his own wrongdoing. *Alleg. County Housing Auth. v. Caristo Constr. Corp.*, 90 F.Supp. 107 (1950); P.L.E. Estoppel §26; *Tarasi v. PNB*, 555 F.2d 1152 (1977), *Harvey v. Minadeo*, 37 Erie 102 (1954) (citing the maxim, "Commodum ex injuria sua nemo habere debet' meaning "no person ought to advantage from his own wrong." Black's Law Dictionary, 5th Ed.). This Court finds that there was sufficient evidence presented at trial to support plaintiff s claim that an agreement with GFG to provide plaintiff with $2 million existed and therefore, defendants must answer in

damages.[1] Dura-Corp and GFG manifested their mutual assent to the essential terms of the bargain, notwithstanding their intent to later formalize their understanding in a written document. This Court finds the testimony of the parties concerning their oral agreement is more than sufficient to support the claim that the parties established the requisite mutual assent.[2] The evidence further establishes with reasonable certainty that an earnest "commitment"

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[1]Before preliminary negotiations ripen into contractual obligations, there must be manifested mutual assent to the terms of the bargain. if the parties themselves contemplated that the agreement cannot be considered complete, and its terms assented to, before it is reduced to writing, no contract exists until the execution of the writing. *Essner v. Shoemaker*, 393 Pa. 422, 143 A.2d 364 (1958) (emphasis added).

An arrangement of terms, in contemplation of a written contract, is not a perfect agreement upon which an action can be maintained, but to produce such effect, it must be shown, by the acts or declarations of the parties that they intended the agreement to be operative before execution, and without regard to the writing. *Onyx Oils & Resins v. Moss*, 367 Pa. 416, 80 A-2d 815 (1951) (emphasis added).

As long as the parties agree on the essential terms they intend to be binding, a contract is formed even though they intend to adopt a formal document with additional terms at a later date. *Field v. Golden Triangle Broadcasting*, 451 Pa. 410, 305 A.2d 689 (1973). *Courier Times v. United Feature Syndicate*, 300 Pa. Super. 40, 445 A.2d 1288 (1982).

[2]1) GFG was to make an equity investment of $2 million in exchange for 80% of the profits until the investment was paid back and 50% of the profits thereafter (Pl. FOF No. 79); 2) GFG would have had decision-making control until its investment was paid back (Tr. 125, 309, 492); 3) The equity funds invested by GFG were to be used to pay creditors, improve marketing and sales, acquire additional production machinery and for operating expenses (Pl. FOF No. 83); 4) The funds were not to be used to repay any part of Thomas R. Eddy's loans to the corporation (Pl. FOF No. 84); 5) GFG would have taken an active role in Dura-Corp's management, and would have been given the right to name a manager to run the company (Tr. 419); 6) GFG made a "commitment" to invest funds and to become a shareholder in the company (Tr. 417, 436); 7) The transaction was to close in May or June of 1990 (Pl. FOF No. 89); 8) The parties orally agreed on the fundamental terms of the transaction (Tr. 419); 9) The parties, who had been friends and business associates for many years, shook hands indicating the earnestness of their agreement (Tr. 309, 584); and 10) The personal relationship of the principals was an important factor in GFG's decision to invest in Dura-Corp (Tr. 490).

between long-time friends and business associates, cemented by their handshake, would have been reduced to a writing and ultimately consummated. The question of the existence or non-existence of an oral contract requires a legal conclusion to be drawn by the fact finder and is not a proper subject: for opinion testimony. *McCrery v. Scioli*, 485 A.2d 1170 (Pa. Super. 1984). Also, the Judge or jury may wholly reject the opinion of any witness. Henry on Evidence, § 531.

In its brief, Rothbury argues that GFG's proposed investment was expressly subject to "PennDOT approval" of the Dura-Hold product, and that this condition was never met. Such a statement not only purposely misconstrues the testimony, it is simply not true. Mr. Christopher Passodelis, a member of GFG's board, testified that GFG was primarily concerned with PennDOT's "nonstructural approval" of the Dura-Hold product for use in flood control projects. The record is quite clear that Dura-Corp received nonstructural approval in March of 1989. The only PennDOT approvals not yet obtained at the time of GFG's oral commitment were required"mix-design" and "quality control" (or "manufacturing plant") approvals later obtained by Dura-Corp in May and August of 1990. These latter two approvals, which Mr. Eddy described as the "final approvals" needed from PennDOT, enabled the final consummation of the GFG equity investment no later than August of 1990.

The $2 million from GFG would have been used to pay bills and keep Dura-Corp in operation. More importantly, it was to be a capital investment. If Dura-Corp had the use of the $2 million GFG investment, this Court finds that there was sufficient evidence at trial to support the plaintiff's claim that plaintiff would have avoided bankruptcy and operated at a profit as projected in its business plan and supporting testimony for at least the life of their licenses. Therefore, the damage that resulted from the loss of the GFG investment cannot be merely the amount of the actual $2 million outlay, but that damage which flowed from the loss of plaintiff's intended use of the investment, the lost projected profits over the life of the licensing agreements and the expenditures made on reliance of the franchise arrangements.

Lost profits over the life of the licensing agreements

The Court finds that as a result of defendants' breach, plaintiff is entitled to lost profits projected over the life of the parties' licensing agreements. The Successor Licensing Agreements were executed by the parties on January 16, 1990 and contemplated performance by the plaintiff through the year 2004. On April 3, 1990 defendant Rothbury generated and sent a letter to plaintiff revoking its license or franchise rights, thereby committing a breach of the Licensing Agreements, per opinion and order of Judge Farino.

Generally speaking, the damages available for a breach of contract can be divided into two categories, recovery of the expectation interest if the contract had been performed, and the reliance interest, the reimbursement for expenditures made or losses incurred in reliance on the contract, the object being to put the plaintiff in the position he would have been in if the contract was not made. Restatement, Contracts 2d., 344, 345; 22 Am Jur 2d. Damages §44; *Emerman v. Baldwin*, 186 Pa. Super 561, 142 A.2d 440 (1958), citing *Harman v. Chambers*, 358 Pa. 516, 521, 57 A.2d 842, 845 (1948).

Expectation Damages

This interest and the measure of damages associated is the actual loss sustained by reason of the breach, which is the loss of what the non-defaulting party would have made if the contract had been performed, less the proper deductions. Expressed in a different way, the non-defaulting party may seek to recover lost profits and other advantages which could have been realized from a final performance of the contract. Restatement, Contracts, 2d §347. Our Commonwealth is in accord with this proposition. *See Maxwell v. Schaefer*, 381 Pa. 13, 1 12 A.2d 69 (1955). To authorize a recovery for lost or prospective profits, it is not necessary that the amount of loss or damage be shown with absolute certainty, but only that it be approximated by competent proof. *Macan v. Scandavia*

Belting Co., 264 Pa. 384, 107 A.2d 750 (1919). Damages, under Pennsylvania law, are recoverable for losses caused or for profits and other gains prevented by a breach of contract, if the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. *Day & Zimmerman, Inc. v. Blocked Iron Corp of America*, 200 F.Supp 132 (1961); *Francis v. Darlington Brick and Mining Co.*, 99 Pa. Super 526 (1930). And, in the case of an established business, lost profits may be recovered if they can be made reasonably certain by competent proof. *Watsontown Brick Co. v. Hercules Powder Co.*, 265 F. Supp. 268 (1967); *Macan, supra.* Plaintiff has sustained its burden of proof. This Court finds credible and reasonably certain the plaintiff's projected profits, and therefore finds defendant Rothbury is liable to plaintiff for expectation interest in the form of lost projected profits over the life of the parties' licensing agreements in the amount of $12,929,900.00.

Reliance Damages

As stated previously, under Pennsylvania law, the aggrieved party in a breach of contract case should be placed in the same position he would have occupied had there been no breach, and he is entitled to be reimbursed for money paid out and for all reasonable and proper expenses incurred on the faith of the contract. *Harman v. Chambers*, 358 Pa.51 6, 57 A.2d 842 (1948). Accord: *Mechanic's Trust Co. v. Fidelity & Cas. Co. of New York*, 304 Pa. 526, 156 A. 146 (1.931); *DePaolo v. DeRomo*, 346 Pa. 654, 31 A.2d 158 (1943); *Maxwell v. Schaefer*, 381 Pa. 13, 112 A.2d 381 (1955); *Emerman v. Baldwin*, 186 Pa. Super 561, 142 A.2d 440 (1958). In the case sub judice, a license agreement had been created by the parties under date of November 3, 1983. After a review of the record in this case, this Court finds that between that date and January 16, 1990, plaintiff had expended the sum of 3.8 million dollars in procuring a U.S. patent, in building and equipping a state-of-the-art manufacturing facility, and laying the ground work for marketing the patented products in the four state area comprised by Pennsylvania, Maryland, Ohio and West Virginia. During this "development" period, plaintiff produced and sold some of the patented products and reported a loss to the

Internal Revenue Service in each of the four years of production; namely 1986, 1987, 1988 and 1989.

On January 16, 1990 the parties executed two Successor Licensing Agreements which terminated the previous license agreement upon their execution. Under date of April 3, 1990, Rothbury revoked plaintiff's license rights under the Successor Agreements, approximately 10 weeks after they had been executed. The problem presented by the foregoing facts is whether the expenditures made by the plaintiff under and pursuant to the original license agreement are recoverable for a breach of the Successor Agreements. Some meager authority exists in Pennsylvania to the effect that expenses incurred prior to the execution of a contract are not recoverable in an action for its breach. *See Smith & Benham v. Curran & Hussey*, 138 F. 150 (1905). It is difficult if not impossible to apply that concept to a franchise agreement where a large lump sum expenditure is made in the very early stages of the contract arrangement for specialized machinery (and/or in the building which houses it) and, under a threat of franchise termination, is forced to enter into a new arrangement in total disregard of the expenditures made in the first arrangement which immediately preceded it. It should not be so easy for the defendants to profit from their unjustified breach.

In construing a contract, our Pennsylvania courts have said that we must seek to ascertain what the parties intended and, in so doing, to fully consider the circumstances, the situation of the parties, the objects they have in mind, and the nature of the subject matter of the contract. *United Refining Company v. Jenkins*, 410 Pa. 126, 189 A.2d 574 (1963). As such, the question of damages for a breach of a contract will not be treated differently. In the case at bar, the plaintiff had expended the sum of 3.8 million dollars pursuant to the initial franchise agreement. This Court finds that the initial expenditures were made for the initial agreement as well as the successor agreements and to rule otherwise would be to ignore the obvious. That expenditure had equipped the plaintiff to perform those activities contemplated by the successor agreements, and without which no performance would have been possible. Proper consideration should be given also to the fact that a patent has a

limited existence, and if not fully exploited during a given period is forever lost to competition. For these reasons, it can be deduced that no Successor license agreement would have been proffered if plaintiff's pioneering expenditures had not been already made and its manufacturing facility had not already been built. There can be no serious doubt that plaintiffs manufacturing ability and promotional success were contemplated equally by both parties to the successor contract, and that all expectations were based thereon. The same or similar rule has been stated in 22 Am Jur Damages §44 as follows:

> "It is apparent that the measure of damages recoverable for a breach of contract in each case must have relation to the nature and purpose of the contract itself, as viewed in connection with the character and extent of the injury. Thus, protection of the restitution, reliance, and expectation interests is not exclusive...
>
> Comment: It has been noted that these interests are not inflexible limits on relief. In a situation in which a court grants such relief as justice requires, the relief may not precisely correspond to any of these interests." (emphasis added).

The "such relief as justice requires" concept has been granted to our appellate courts by statute. See 42 Pa. C.S.A. Sec. 706 where it is stated as follows:

> "An appellate court may affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances." (emphasis supplied).

See also Restatement, Contracts 2d §344.

Therefore, this Court finds that justice requires the defendant Rothbury must answer in damages to plaintiff for the expenditures made pursuant to the parties' franchise arrangement and awards plaintiff reliance damages of $3.8 million.

Standard of Proof

Pennsylvania law is in accord with the standards (1) that evidence of damages may consist of probabilities and inferences as well as direct and positive proof *(E.C. Ernst. Inc. v. Koppers Co., Inc.*, 626 F.2d 324 (3rd Cir. 1980); *McElroy v. Filby*, 83 Pa..Super. 47 (1924); 11 P.L.E. Damages §157 et seq; (2) that justice and public policy require that the wrongdoer bear the risk of uncertainty which his own wrong has created (*Rea v. Ford Motor Co.*, 355 F.Supp 842 (W.D. Pa. 1973)); *Commonwealth Trust Co. of Pittsburgh v. Hackmeister Lind Co.*, 320 Pa. 233, 181 A.787 (1936); and (3) that the law does not demand that the estimation of damages be completely free of all elements of speculation (*Taylor v. Paul O. Abbe, Inc.*, 380 F. Supp. 601 - E.D. Pa. (1974). It is well settled in Pennsylvania that loss of profits are recoverable upon proper proof, both in contract and in tori. In contract cases, the general rule allows such damages where (1) there is evidence to establish them with reasonable certainty, (2) there is evidence to show that they were the proximate consequence of the wrong, and (3) that they were reasonably foreseeable. *R.I. Lampus Co. v. Neville Cement Products Corp.*, 474 Pa.199, 378 A.2d 288 (1977); *Frank G. Bozzo, Inc. v. Electric Weld Division*, 283 Pa. Super. 35, 423 A.2d 702 (1980); Restatement 2d., Contracts §351. Plaintiff's business plan included the cost of raw materials, transportation charges, employee costs, machine and production capacity, production variables, market opportunities, sales studies and break-even and profit estimates. The data was presented in tabular or graphic form, all of which was gleaned from the plaintiff's actual performance records over a 3-4 year period.

This Court finds 1) that plaintiff sustained its burden of proof by establishing lost profits with reasonable certainty; 2) that the loss of profits were without a doubt the proximate consequence

of defendants' breach of contract; and 3) that plaintiff's losses were absolutely foreseeable given the fact that plaintiff's business existed solely for the purpose of manufacturing defendant's patented products. Without the right to manufacture defendant's patented products, plaintiff had no reason to operate and due to the specialized equipment used at Dura-Corp, plaintiff could not manufacture other products to mitigate its damages.

Reasonable certainty

Our courts have expressed a reluctance to award loss of profit damages in "new and untried" businesses because of the lack of "reasonable certainty" presented thereby and contained therein. *See Exton Drive-In, Inc. v. Home Indemnity Co.*, 436 Pa. 480, 261 A.2d 319 (1969); *Pines Plaza Bowling, Inc. vs. Rossview. Inc.*, 394 Pa. 124, 145 A.2d 672 (1958); *Pollock v. Morelli*, 245 Pa. Super 388, 369 A.2d 458 (1976). On the other hand, it is well settled that lost income or profit is recoverable in an action for the destruction or interruption of an "established" business whenever they are not merely speculative or conjectural. *Watsontown Brick Co. vs. Hercules Powder Co., supra*; *Macan v. Scandavia Belting Co., supra.*

This Court finds that Dura-Corp was an "'established" business at the time of defendants' breach of contract and tortious acts. The business of making dry cast concrete blocks weighing 1,700 pounds had never been performed anywhere in the world prior to June of 1986, however, production of such blocks were being realized at the Dura-Corp plant for almost four years at the time of defendants' breach. At that time Dura-Corp was poised and ready to reap the harvest of its marketing and production efforts. Indeed, vast new markets had been created by Dura-Corp's obtaining the PennDOT approval of March, 1989. The evidence at trial was sufficient to warrant this Court's finding that similar approvals of the Departments of Transportation in West Virginia, Maryland and Ohio were soon to be realized. Also, plaintiff argues that a new product known as Dura Hold II (which was specifically licensed under the successor agreements) had been developed by

plaintiff and could be produced twice as fast as Dura-Hold at half the production and transportation cost, thereby creating the substantial possibility of a greatly increased market area with correspondingly increased profits.[3]

Proximate Cause or Consequence

Proximate cause has been defined as "that which, in natural and continuous sequence, unbroken by an efficient intervening cause produces injury, and without which the result would not have occurred." Black's Law Dictionary, Fifth Edition 1979, Accord:

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[3]The arithmetic associated with PennDOT's non-structural approval for stream bank protection is enlightening and the following figures should be considered. There are 5,280 feet in a mile. The length of a Dura Hold block is 6 feet: its height is 1 foot: the height of an average stream bank wall is 6 feet. It would therefore take 5,280 blocks of Dura Hold to protect one side of a stream bank one mile in length and 6' in height. Because there are 54,000 miles of streams in Pennsylvania, the potential market therefor in Pennsylvania alone would be 28,512,000 blocks. Because Dura-Corp's annual product on from one machine on a one 8 hour shift basis was 37,000 units, it would take 7,700 years to line all of the Pennsylvania streams on one side only. That leaves the other side of Pennsylvania streams and DOT work in the states of West Virginia, Maryland and Ohio to be accounted for. Needless to say, a vast market existed for plaintiff to exploit and profit from. Somewhat more realistically, it should be noted that PennDOT purchased 330,000 face square feet of gabion baskets from 1990 through 1995. Because each Dura Hold unit contains 6 face square feet (6' x 1'), PennDOT's annual consumption of gabions was the equivalent of 11,000 Dura Hold units per year, or approximately 1/3 of Dura-Corp's annual Production rate from one machine on a one shift basis. It should also be kept in mind that PennDOT had already found Dura Hold blocks to be more than cost competitive with gabions and more aesthetically pleasing. Also, one must consider PennDOT's expenditure of $32,500,000.00 for retaining walls in 1989, the last full year preceding Rothbury's breach. If Dura Hold were used for all of it, it would require 541,666 units of Dura Hold evaluated at $60.00 per unit. If $10.00 per unit is added for transportation the figure would be reduced to 464,285 units, or approximately 13 years of Dura-Corp's said annual production. In view of the fact that Dura-Corp's annual break even point of production was computed at $1,380,300.00, or the dollar equivalent of 23,000 Dura Hold units at $60.00 per unit, the PennDOT approval alone would have in all probability been more than sufficient to generate substantial profits in line with plaintiffs business plan Projections.

Wisniewski v. Great Atlantic & Pac. Tea Co., 226 Pa. Super 574, 323 A.2d 744, 748 (1974); *Stemmer v. City of Pittsburgh*, 287 Pa. 365, 135 A.100, 101 (1926). This Court can imagine nothing more "proximate" than (lie wrongful termination of plaintiff's franchise followed by a chain of written communications, commenced by Rothbury's revocation letter of April 3, 1990, and ended by the November 20, 1990 letter which was sent to more than 200 of Dura-Corp's actual or potential customers. But for the defendants' conduct, Dura-Corp most likely would have experienced a successful consummation of its marketing and research efforts. At the time of the revocation, GFG's capital infusion was ready to be made. Plaintiff provided sufficient evidence at trial to show that the amount of $2 million was more than adequate to satisfy all of Dura-Corp's current bills and to provide for some future product promotion and plant expansion. Recent PennDOT approval had created considerable market expansion which Plaintiff claims would have spread to Maryland, Ohio and West Virginia, and the development and promotion of the Dura Hold 11 product would have greatly aided that expansion.

Reasonable Foreseeability

It has been held in Pennsylvania that profits, which are the direct and immediate fruits of the contract, are part and parcel of the contract itself, and must be accepted as within the contemplation of the parties at the time of its execution. *Hendler v. Quigley*, 38 Pa. Super 59 (1909); *Stewart v. Turner*, 72 Pa. Super. 235 (1919); *White v. Goodman*, 78 Pa. Super 254 (1922). Execution and pursuit of an exclusive franchise agreement covering a specific market area contemplates profits as the end result, especially where the franchisee has expended a sum of approximately $4 million to exploit the franchise grant. The foreseeability of the $2 million infusion of capital from GFG has been previously discussed. In light of the foregoing authority, two fairly recent cases decided by the Pennsylvania Superior Court, *Merion Spring Co. vs. Muelles Hos Garcia Torres*, 315 Pa. Super 469, 462 A.2d 686 (1983) and *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super 90, 464 A.2d 1243 (1983) should be

discussed as they affect, support or modify prior precedents dealing lost profits as an item of damage in breach of contract cases.

Merion Spring was argued before Spaeth, Rowley and Cirillo, J.J. on May 5, 1982. it was decided and filed on May 27, 1983, approximately one year later. The agreement in *Merion Spring*, required the plaintiff to sell and the defendant to buy a certain number of automotive spring manufacturing machines. Following numerous disputes of the parties relating to the physical condition of the machinery and delinquent installment payments made as a result thereof, defendant completed construction of the plant intended to house the manufacturing machines. Because of progressive deterioration of the machinery, defendant did not complete payment of the full purchase price, and did not take possession of the machinery which was listed by the plaintiff for public sale and purchased thereat by plaintiff at a nominal price. Plaintiff then sued for the balance of the purchase price and defendant counterclaimed for breach of contract.

In upholding an award for lost profits to defendant on its counterclaim, the court relied on the Restatement, Second, Contracts §331 (1), comment (c) which states in pertinent part as follows:

> "The present section does not purport to divide profits into kinds of classes.. The rule applicable to profits is in no respect different from that applicable to all gains prevented or losses suffered; it is proving income and outgo that the amount of any kind of profit is established. The kind and amount of evidence that will be held to afford a sufficient basis for estimation varies greatly in different kinds of cases."

The court also cited with approval the case of *General Dynafab. Inc. v. Chelsea Industries, Inc.*, 301 Pa. Super 261, 265-66, 447 A.2d 958, 960 (1982) There, plaintiff General Dynafab "arguably a new comer" showed that there was "significant interest" in its product before Chelsea breached the contract, and demonstrated

through various means what it estimated to be its lost profits. Those various means included projected sales, raw material needs and profitability of the plant.

On the facts, this case is on all fours with *Merion Spring*. There, the Court stated at p. 697 that:

> "The only witness to testify as to Mueller (defendant's) lost profits was its general manager Cano. ... Cano provided specific data concerning... estimated plant production prices, direct and indirect labor cost, the cost of skilled and supervisory labor, administrative and sales staff and operations expenses... The figures he produced came from his own knowledge; either he personally developed the data in his capacity as Muelles general manager or he was aware of the prevailing rates and figures because of his long association with the automobile parts industry... At almost every point, Cano utilized patently conservative data in estimating Muelles' lost profits... Under ideal or even under more realistic conditions, Muelles lost profits could have been substantially higher... We also note that Merion's counsel could not shake Cano's testimony during cross-examination and that Merion presented no testimony to rebut or contradict those matters which Cano asserted to be fact."

And further at p. 698, the Court stated:

> "Furthermore, the imprecision encountered in this case is no greater than that encountered in survival actions brought by the estates of minors where the future earnings of the decedent minors are calculated through the use of statistical averages and future possibilities which no longer have a chance of becoming reality." (citing cases).

The court then re-instated the original award of $200,000 to defendants on the counterclaim for lost profits. In the case at bar, numerous witnesses offered testimony in support of Dura-Corp's lost or projected profits, all of which was also contained in Dura-Corp's comprehensive business plan. Some of the detailed information contained in the business plan was not supported by sworn testimony and could be found to be objectionable unless defendants' use of the information on cross-examination cured the defect.[4] However, the sworn testimony of Thomas R. Eddy, Thomas G. Eddy, Alvin Katz, Craig Church, Gary Hoffman, Christopher Passodelis, Louis Gaetano, E.J. Biernesser and Robert Sill which was supportive of lost profits was overwhelming. All of the various and relevant factual categories enumerated in *Merion Spring* were covered adequately and conclusively by them, and much more pertinent information was added thereto. Mr. Hoffman, chief executive officer of PennDOT and a completely disinterested witness, offered testimony on the approval of Dura-Corp's Dura Hold product and the positive significance of that approval in other governmental agencies both within and without the Commonwealth of Pennsylvania. He testified to information on PennDOT's dollar volume use of gabion baskets and reinforced the view that Dura-Hold was more cost competitive than gabions, especially in the installation phase of wall erection. Mr. Sill established the fact that the annual budget for PennDOT's general use of retaining walls was in the grandiose sum of $32,500,000.00. Thomas R. Eddy testified that governmental publications show 54,000 miles of streams in Pennsylvania alone, and that the states of Maryland, Ohio and West Virginia could be added thereto. Mr. Alvin Katz, a duly qualified expert in accounting and finance, accredited the method of tabular and graphic depiction and analysis employed by Thomas G. Eddy in computing Dura-Corp's lost projected profits and discounting the same to $12,929,900.00. In the process thereof, said Thomas G. Eddy, who was also academically qualified in finance and accounting, and a duly elected officer of Dura-Corp,

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[4]The business plan was admitted into evidence with the caveat that any part of it which might be characterized as hearsay would be subject to defendants' objections unless it was thereafter substantiated by sworn testimony and tested by cross-examination.

used actual company books and records to lay the foundation for the projections, and supplemented it with intensive research into the potential retaining wall market of Dura-Corp's four-state area.

As in *Merion*, said Mr. Eddy produced his figures from his own personal knowledge, or he personally developed the data in his capacity as plaintiffs vice-president, or he was aware of prevailing costs and selling prices because of his employment as an officer of Dura-Corp. At almost every point, he utilized patently conservative data in estimating plaintiff's lost profits, and here, as in *Merion*, Dura-Corp's lost profits could have been substantially higher under ideal or more realistic conditions. As in *Merion*, defendants' counsel could not shake any of plaintiff's said witnesses' testimony during cross-examination, in particular that of Thomas G. Eddy, and presented no testimony to rebut or contradict those matters which said Mr. Eddy asserted to be fact. It should be emphasized here that no employee or officer of either defendant was called to testify for the defendants. In a civil action, the failure of a party litigant to testify gives rise to an inference that his testimony, if given would have been unfavorable to him and such inference is justified. *Dommes v. Zuroski*, 350 Pa. 206, 38 A.2d 73 (1944). This also applies to the failure to call or produce an informed, competent and non-hostile witness, such as a current employee or officer of defendant companies. *Wise v. Wise*, 157 Pa.Super. 599, 43 A.2d 368 (1945). Adverse inferences in support of Thomas R. and Thomas C. Eddy's testimony can be drawn therefrom. Thomas G. Eddy's direct testimony and his projection of Dura-Corp's lost profit using a trend line analysis is acceptable under the law of Pennsylvania, thereby validating pages 42 through Appendix 8 of the business plan. *See Com. v. Harris*, 186 Pa. Super. 59, 63, 140 A.2d 344, 345 (1958) where the court stated:

> "The witness may state relevant facts known to him, because of experience, even though he is not regarded as an expert whose opinion would be admissible upon a hypothetical inquiry... If he has any reasonable pretension to specialized knowledge on the subject under investigation he may testify,

> and the weight to be given to his evidence is for the jury." (citations omitted).

The court further held:

> "Whether the knowledge of the witness justifies the admission of his testimony is a matter for preliminary inquiry by the trial court, being largely a question within its discretion, and the affirmative determination as to competency will not be interfered with by this court except In cases of clear error." (citations omitted).

Said Mr. Eddy's testimony was preceded by that of Alvin Katz who qualified as a business expert and management consultant who provided financial, accounting and computer and data processing information to small and medium sized businesses. Mr. Katz was a lecturer in accounting at the University of Pittsburgh, held a BBA degree from there, held an MBA from Xavier University in advanced business economics and was a CPA in the Commonwealth of Pennsylvania for 30 years. At trial, he testified as an expert and validated the form of plaintiff's business plan.[5] Mr. Thomas G. Eddy supplied said information which was

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[5]Mr. Katz' testimony produced the following points:

1) That plaintiff's business plan was well done and appropriate; 2) His review thereof included a review of the underlying assumptions and a testing of the Financial information: 3) The typical plan of a business with some operating history would present financial statements as well as projections of future operating results, a 3-5 year time horizon being appropriate: 4) Dura-Corp's business plan contains such information; 5) He reviewed pages 49 through 84 of the plan containing tabular and graphic depictions of financial analyses and projections, all of which was in acceptable form of presenting that particular information; 6) It contained a sales history trend line analysis which is a very popular and accepted method used to project future results based upon historical results; 7) He did not render an opinion as to the accuracy of the information contained therein.

reproduced from Dura-Corp's actual business records and much of which he generated while in his position as a Dura-Corp officer.

As in *Merion*, *Delahanty* was also argued before the same panel of Spaeth, Rowley and Grillo, J.J. It was argued on May 3, 1982 and decided and filed on July 15, 1983, approximately 2 months after *Merion Spring*. On the issue of lost future or anticipated profits, the court reached divergent results, allowing such profits in *Merion* and disallowing them in *Delahanty*. In *Merion* the proof was detailed and bountiful despite the fact that the contract was never performed in whole or in part. It was substantiated by a non-expert who had an intimate and exhaustive knowledge of the business enterprise and who was correctly permitted to testify as such. In *Delahanty* the subject operation had existed for seven months, but calculations of lost profits were "woefully inadequate". The court went on to say at page 1260:

> "Delahanty sought to show a loss of profits by Cascade by introducing an exhibit which contained handwritten calculations, projecting Cascade's operation for 6 full years. Delahanty had prepared this table in preparation for trial, at the request and with the assistance of his attorney. Delahanty testified concerning what he used as the basis for the figures in the table. The basis for his estimations and projections was not, however, established in the record. No evidence was presented that supported the assumption that the business would have a profit the first year of operation and that this profit would increase annually at a rate of ten (10%) percent. ..." (emphasis added).

Delahanty thus is easily distinguished from the case at bar and is not authority for denying recovery of lost profits here. The instant case is, however, on all fours with Merion Spring and Dura-Corp's proof of lost profits is conclusive on that item of plaintiff's damage.

Tortious Interference with Contracts

The record speaks loudly and clearly to the issue of tortious interference with the plaintiff's contractual relations, and the trail left by defendants' malevolence is obvious. It should first be noted that a reasonable inference can be drawn from the testimony that the Risi family controlled both corporate defendants, and that each defendant was used as an instrumentality, of the other. The Court therefore finds that, although Rothbury alone was a signatory to the Successor License Agreements, both defendants are equally culpable for the tortious actions aimed at plaintiff. Once again, the failure of either defendant to testify at trial supports this inference. Not only did defendants respond maliciously and negatively to plaintiff's written attempt to revive the franchise agreements following their abrupt termination, they almost immediately informed in writing Site Control Systems, one of Dura-Corp's contract distributors, that Dura-Corp's franchise had been terminated and that its distributor agreement was no longer viable. At the time this occurred; namely on April 25, 1990, Site Control had been employed as a distributor from April 19, 1989 and had accumulated sales of Dura-Corp's products in excess of $340,00.00 during that one-year period.

Because plaintiff's promotional efforts were about to shift into high gear, and because of DOT approval in Pennsylvania and pending approvals in Ohio, Maryland and West Virginia, it can be validly deduced that sales for Site Control would have equalled or exceeded the aforementioned sales figures for every like period encompassed by the successor licensing agreements. A factor of 13 is deducible therefrom, making a total projected accumulation of Site Control's sales over that period of $4,420,000.00. The same analysis can be made for Dura Sales which entered into a written distributor agreement on October 1, 1990 which was in effect terminated by defendants on May 30, 1991, approximately 8 months later. During that period, Dura Sales sold products in the total sum of $405,575.00. Using a factor of 19, Dura Sales' total over the period of the successor agreements would have accumulated to $7,705,925.00, thereby making a grand total from distributor contracts of $12,125,925.

Defendants' disregard of plaintiff's rights did not stop with the April 25, 1990 letter. Under date of November 30, 1990, defendants delivered a final barrage of written communications to more than 200 of Dura-Corp's actual or potential customers, including the County of Allegheny which, because of the Pine Creek project, was the largest and most important. The Pine Creek Project, over a period of less than 2 years, involved sales of $472,000.00 for the use of Dura Hold for stream bank protection against flooding. The letter, dated November 28, 1990, stated that Dura-Corp's license had been terminated and that franchise rights had been transferred to another named company. The Allegheny County business ended with the letter.

The law on this subject in Pennsylvania is quite clear, and is stated in 7 P.L.E. § 7 as follows:

> "Interference, without justification or privilege, with a legal right arising out of the business, occupation, or contracts of another is a tort which may be redressed by a common law action... to recover damages for deprivation of the advantage or benefit to which the Plaintiff was entitled."

It has also been stated that interference had its origin in "malice" and has remained almost entirely an intentional tort. Prosser on Toris 2d Ed. § 106. Pennsylvania courts have generally held that actionable interference is malicious, and have gone on to say that maliciousness does not necessarily mean actual malice or ill will, but instead may mean the intentional doing of a wrongful act without legal or social justification, or may mean the wanton disregard of the rights of others. *Dora v. Dora*, 392 Pa. 433, 141 A.2d 587 (1958); *Eddyside Co. v. Seihel*, 142 Pa. Super 174, 15 A.2d 691 (1940); *Klauder v. Cregar*, 327 Pa. 1, 192 A. 667 (1937); *Caskie v. Philadelphia Rapid Transit Co.*, 334 Pa. 33, 5 A.2d 368 (1939). *See also Arvins v. Moll*, 610 F.Supp. 308 (1984), affd. 774 F.2d 1150 and *Consolidation Coal Co. v. District 5, United Mine Workers of America*, 336 Pa. Super 354, 485 A.2d 1118 (1984).

The loss of profits is recoverable in Pennsylvania in tort actions, and the proof required is practically the same as in breach of contract. *See Kosco v. Hachmeister, Inc.*, 152 A.2d 673 (1959); *Ashcraft v. C.G. Hussey Co.*, 359 Pa. 129, 58 A.2d 170 (1936). Thus, the general rule for recovering lost profits in a tort action requires evidence to establish them with reasonable certainly, and evidence that they were the proximate consequent of the wrong. However, no foreseeability is required. *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super 90,. 464 A.2d 1243 at 1258 (1983); *Francis v. Darlington Brick & Mining Co.*, 99 Pa. Super 526 (1930); *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205 (1970). The tort of malicious interference with contracts has been clearly established in the case at bar. However, because this Court is awarding lost projected profits over the life of the successor agreements in the amount of $12,929,900.00 under the breach of contract claim (almost the same amount calculated as the amount lost on the above stated contracts which were interfered with), to award the, lost profits on contracts interfered with might result in a double recovery. However, plaintiff is awarded punitive damages as a result of defendants' tortious interference.

Punitive Damages

The law in Pennsylvania on punitive damages is both old and revered, and new and dynamic, and admits of little or no uncertainty. Said damages, which are in addition to compensatory damages, are frequently and properly given, being designated variously as punitive, exemplary or vindictive damages, 11 P.L.E. § 14. Thus, punitive damages are damages other than compensatory or nominal damages which are awarded against a person to punish him for his outrageous conduct. *Phillip v. U.S. Lines Co.*, 240 F. Supp. 992 (E.D. Pa. 1965), affd. 355 F.2d 25 (1965). Also, punitive damages will be allowed for torts that are committed willfully, maliciously or so carelessly as to indicate wanton disregard of the rights of the injured party. *Adelman v. Rosenbaum*, 133 Pa. Super 3886, 3 A.2d 15 (1939); *Lake Shore & M.S. Ry Co. v. Rosenzweig*, 113 Pa. 519, 18 W.N.C. 162 (1886); *Philadelphia Traction Co. v. Orbann*, 119 Pa. 37, 12 A. 816 (1888). Equally

well established is that exemplary damages must not be disproportionate to the award of compensatory damages, and that in determining the amount thereof, not merely the activity must be considered, but all surrounding circumstances, including the motives of the wrongdoer and the relation between the parties must be considered. *Hughes v. Babcock*, 349 Pa. 475, 37 A.2d 551 (1944). Exemplary damages are penal, not compensatory, in nature, and the judge or jury fixes the amount of such damages without a yardstick, subject only to reductions by the court if deemed excessive under the circumstances of the particular case. *International Electronics Co. v. N.S.T. Metal Products Co.*, 370 Pa. 213, 88 A.2d 40 (1952). In tile relatively recent case of *Delahanty v. First Pennsylvania Bank, N.A.*, cited and explained *supra*, for another legal proposition, the court awarded compensatory damages for the tortious destruction of the plaintiff's business in the sum of $40,000.00. A ratio of 11 to I was applied thereto which resulted in a punitive award of $440,000.00 which the Court found not to be so clearly excessive as to require a reduction on that issue.

In the case at bar, the conduct of the defendants following the revocation of Dura-Corp's franchise was flagrant, outrageous and in wanton disregard of plaintiff's rights in the following particulars: 1) in notifying Dura-Corp's distributors and all of its other potential or actual customers that Dura-Corp's franchise had been forfeited; 2) In directing Dura-Corp's distributors to purchase all future patented products from Rothbury; 3) In informing in excess of 200 of Dura-Corp's actual or potential customers, including Allegheny County, that Dura-Corp's franchise had been terminated and that all of Dura-Corp's rights had been transferred to Camber Corporation; 4) In permitting and encouraging products made outside the Commonwealth of Pennsylvania to be shipped into parts of Dura-Corp's exclusive territory.

This Court finds the foregoing acts of the Defendants constitute a breach of the duty of good faith and fair dealing owed by defendants to the plaintiff and amounted to such outrageous and egregious conduct as to justify a punitive award. Plaintiff's compensatory damages for malicious and/or tortious interference

with contractual relations were realized In lost profits over the life of the licensing agreements in the amount of $12, 929,900.00. This court also Finds punitive damages, In the equal the amount of $12, 929,900.00 to be justified.

An order to follow.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

DURA-CORP, a Pennsylvania
business corporation,

Plaintiff,

vs. GD90-21096

ROTHBURY INVESTMENTS,
LTD., a Canadian Corporation,
and RISI STONE, LTD., a
Canadian corporation,

ORDER OF COURT

AND NOW, to wit, this 6th day of December, 1996, it is hereby **ORDER and DECREED:**

(1) Judgment is hereby entered in favor of Plaintiff Dura-Corp and against Defendants Rothbury Investment Ltd., and Risi Stone Ltd., jointly and severally, for compensatory damages in the sum of $12,929,900.00;

(2) Judgment is hereby entered in favor of Plaintiff Dura-Corp and against Defendant Rothbury investment Ltd. for compensatory damages in the amount of $3,800,000.00; and

(3) Judgment is hereby entered In favor of Plaintiff Dura-Corp and against Defendants Rothbury Investment Ltd., and Risi Stone Ltd., Jointly and severally, for punitive damages In the amount of $12,929,900.00.

By the Court:

/s/ Zeleznik, J.
Zeleznik, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

DURA-CORP, a Pennsylvania
business corporation,

Plaintiff,

vs. GD90-21096

ROTHBURY INVESTMENTS,
LTD., a Canadian Corporation,
and RISI STONE, LTD., a
Canadian corporation,

ORDER OF COURT

AND NOW, to wit. this 21st day of January, 1997, Post Trial Motions having been filed and argued before this Court, it is hereby **ORDERED, ADJUDGED and DECREED**:

(1) Judgment is hereby affirmed in favor of Plaintiff Dura-Corp and against Defendant Rothbury Investment Ltd., and Risi Stone Ltd., jointly and severally, for compensatory damages in the sum of $12,929,900.00 (Plaintiff's claims for compensatory damages having not been waived);

(2) Judgment hereby affirmed in favor of Plaintiff Dura-Corp and against Defendant Rothbury Investment Ltd. for compensatory damages in the amount of $3,800,000.00; and

(3) Defendants' Counterclaims are hereby dismissed;

(4) The punitive damage award entered in favor of Plaintiff Dura-Corp and against Defendants Rothbury Investment Ltd , and Risi Stone Ltd., jointly and severally, in the amount of $12,929,900.00, is hereby vacated for the reason that no evidence of either Defendants' net worth or wealth was presented at trial.

Judgment is entered on the verdict accordingly.

By the Court:

/s/ Zeleznik, J.
Zeleznik, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

DURA-CORP, a Pennsylvania business corporation,

Plaintiff,

v.

ROTHBURY INVESTMENTS, LTD., a Canadian Corporation, and RISI STONE, LTD., a Canadian corporation,

Defendants.

CIVIL DIVISION

No. GD90-21096

BRIEF FOR PLAINTIFF

Filed on behalf of DURA-CORP, Plaintiff

Counsel of Record for this Party:

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BRIEF FOR PLAINTIFF

STATEMENT OF THE CASE

This case involves the wrongful termination of a license (franchise) agreement, and the franchisor's subsequent tortious interference with the franchisee's business. This Court, (per. Farino, J.) previously granted plaintiff s Motion for Summary Judgment, declaring that the License Agreement was wrongfully terminated, and that Plaintiff s obligations thereunder were suspended during the period of Defendants' breach. Judge Farino's decision was subsequently upheld by the Superior Court of Pennsylvania. Two defendants, namely Risi Stone, Ltd. (hereinafter "Risi Stone") and Rothbury Investments, Ltd. (hereinafter "Rothbury") are involved herein. Both are Canadian corporations owned and controlled by the Risi family of the province of Ontario. Risi Stone was the original licensor (franchisor), having received letters patent from the United States Patent Office on December 25, 1984 largely through the efforts and financing of Thomas R. Eddy, Esq. Said patent rights which covered certain unique, pre-cast concrete retaining wall systems were subsequently assigned to Rothbury.

The plaintiff is Dura-Corp, a Pennsylvania corporation, which was incorporated in September of 1984 by said Thomas R. Eddy, who had considerable experience in mining, construction and real estate development. Dura-Corp was created for the dual purpose of manufacturing and selling some of the Risi patented products in a four state area comprised of Pennsylvania, Ohio, West Virginia and Maryland, in which Dura-Corp's rights were exclusive. In the process of pursuit its license grant, a modern state-of-the-art manufacturing plant was erected by Dura-Corp in New Stanton, Pennsylvania, the approximate geographical center of the four state area. Said plant was equipped with the most technologically advanced German concrete mixing and manufacturing machinery. At this point all funding had been personally supplied by Thomas R. Eddy. or on the strength of his credit, in the form of loans to Dura-Corp. A total of 1.3 million dollars had already been expended on plant acquisition, plant modifications and the purchase of machinery.

By June of 1986, the plant was ready to run and production of certain Risi products named Dura-Hold and Dura-Crib was actually commenced. Many production problems developed over the next two year period. All of them were successfully resolved by Dura-Corp personnel with little or no aid, assistance or guidance from the Canadian franchisors, despite the fact that the German machines and the production protocol had been strongly recommended and approved by them. Said problems existed, inter alia, in the acquisition of pallets made of uncured wood, and improperly constructed German mold boxes, both of which had the tendency to slightly deform the product thus making installation thereof much more difficult than it otherwise would have been. Problems were also encountered in other forms, including, but not limited to, replacement of German electrical components which were designed to operate on a different voltage system than was available from local electrical companies serving the New Stanton area. The fact that the Dura-Corp production of Dura-Hold units was a prototype operation, never having been performed anywhere else in the world, made the search for solutions to these unanticipated and unforeseeable problems difficult, expensive and time-consuming. Notwithstanding the foregoing, the products sold and delivered by Dura-Corp were generally of good quality.

A marketing program was also instituted by Dura-Corp in 1986. It included studies of competing products, mass mailings, advertising in trade catalogues, personal contacts with prospective purchasers and users, and the development of an accepted and approved routine in dealing with various governmental agencies, particularly those involved in erosion control of stream banks to prevent or mitigate the effects of flash flooding.

The latter pursuit led to the Pennsylvania Department of Transportation and its testing and product approval regimens. Securing PennDOT approval of Dura-Corp's products was a critical achievement, because, if successful, it would open doors to all municipalities and other governmental agencies in the four state area which were engaged, inter alia, in local flood control. It also opened the door to all governmental units in the northeast corridor of the United States which engage in the construction and

maintenance of public highways, dams and earth encroachment and/or retention situations.

In order to procure PennDOT approval, it became necessary to build an experimental "Dura Hold" retaininig wall and to prepare and submit an engineering manual to PennDOT for approval. Such an experimental wall was constructed by PennDOT employees under the supervision of Dura-Corp using Dura Hold blocks supplied gratuitously by Dura-Corp. The construction of the wall was successful, leading to the PennDOT opinion that Dura Hold was an effective and cost-saving substitute for gabion baskets in controlling stream bank erosion. Working with local engineers and without participation by the Franchisor, Dura-Corp produced an engineering manual at a cost of $80,000.00 which was ultimately approved by PennDOT. An expenditure of money in the approximate sum of $500,000.00 was made by Dura-Corp over a period in excess of 2 years which resulted in a non-structural PennDOT approval of Dura-Corp's Dura-Hold product in March of 1989. Stream bank erosion control is a non-structural application of the Dura-Hold unit.

Various attempts were made by Dura-Corp between 1987 and 1990 to obtain financing from some source other than Thomas R. Eddy, who was beginning to feel the pinch created by the substantial expenditure of funds which had by then persisted for a period of 4 or 5 years.[1] A source of outside financing, was thereafter located in the person of the Gateway Financial Group, (hereinafter" GFG"), a venture capital company whose members included personal friends and former business associates of Thomas R. Eddy. A due diligence study implemented by GFG during the year of 1989 emphasized their desire for PennDOT non-structural approval, and a revamping of Dura-Corp's licensing agreement with Rothbury, the former of which was obtained in March of 1989, and the latter of which was obtained in January of 1990 in the form of the Successor License Agreements. Shortly thereafter, GFG made

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[1]Defendants had been made aware of Plaintiffs need for an infusion of investment capital as early as February of 1987 at an annual stockholders' meeting.

an oral commitment to supply the sum of 2 million dollars to Dura-Corp to alleviate its immediate financial dilemma and to provide capital for advertising and plant expansion, but not for the repayment of any loans. At the time of receiving, the oral commitment, Dura-Corp's current liabilities were in the sum of $500,000.00, exclusive of loans which had been made to it by Thomas R. Eddy. While a written document was in the process of being prepared to memorialize the oral agreement, Rothbury wrote a letter, without prior notice to Dura-Corp, brutally revoking Dura-Corp's franchise. The letter, dated April 3, 1990, was distributed to Dura-Corp and to some of its actual customers. Dura-Corp almost immediately attempted to salvage the situation by offering to pay, by letter dated April 24, 1990, the sum of $29,000 which was purportedly owed to Risi Stone. Said debt was evidenced by a promissory note, payable to Risi Stone, and for the non-payment of which Rothbury, wrongfully, revoked Dura-Corp's franchise as aforesaid.

All immediate attempts made by Dura-Corp to revive the franchise relationship were arrogantly and summarily refused by Rothbury. Plaintiffs April 24 letter also informed defendants that their conduct was interfering with plaintiffs attempts to procure outside financing. No response thereto was ever made by defendants. But, to add further fuel to the fire, Rothbury sent a letter dated April 25, 1990, to Site Control Systems, one of Dura-Corp's written contractual distributors. The letter informed Site Control that Dura-Corp's License had been terminated and that Site Control could no longer be a distributor for Dura-Corp. By letter dated May 30, 1991, Rothbury advised Rodger D. Costello, t/a Dura Sales, and another of Dura-Corp's written contractual distributors, under contract dated October 1, 1990, to the same effect. Both of said distributors were instructed to henceforth purchase all Risi patented products from Rothbury which, to further its deceitful practices, had created a supplier and/or owner relationship with a competing manufacturing facility in the state of Virginia, the only other facility in existence.

Both prior and subsequent to said letters, one of the distributors had, with the help and connivance of Rothbury,

infiltrated markets in Pennsylvania which had been painstakingly created and nurtured by Dura-Corp.

As a direct result of the license termination and reinstatement refusals, GFG withdrew, in August of 1990, its offer to supply the needed capital. In February of 1991, Dura-Corp was forced into an involuntary bankruptcy by creditors' claims totaling between $6,000 and $10,000.

At the time of the license termination, Thomas R. Eddy had loaned the sum of 3.8 million dollars to Dura-Corp, all of which had been consumed in Dura-Corp's operations. During the period in which it had attempted to procure outside financing, Dura-Corp produced a business plan which was completed and published in September of 1989. Said business plan clearly showed projected profits through the life of Rothbury's patents (encompassed by the Successor License Agreements) in a discounted sum of $12,900,000.00, all of which was lost because of Rothbury's precipitous termination of the franchise agreement and its subsequent aggravation following the termination. Although the plan did not take into account the business to be generated by the aforementioned PennDOT approval, it did portray the development of the new Dura-Hold II product, which was also contained in Dura-Corp's engineering and design manual. Dura Hold II had been developed by Dura-Corp to further increase the marketability and competitiveness of Dura-Corp's products both inside and beyond the licensed territories, thereby potentially resulting in a greatly increased volume of sales and profits for Dura-Corp. Unfortunately, this did not come to pass because a successful resolution of Dura-Corp's unconditional right to manufacture and sell the Dura Hold II product did not occur until January 16, 1990, and the license termination, born of the Risi's greed, malice and jealousy, erupted scarcely 6 weeks later.

The format of the business plan was approved by a duly qualified expert in the business field. It was supplemented by an officer of Dura-Corp, who had an academic background in business finance and management accounting. He used records of actual company performance over a 3 year period, and reasonable

expectations propounded from extensive market research, to complete the projections contained therein. The projections did not consider the business to be created by the accomplishment of the 3 stage PennDOT approval, only one of which had been achieved at the time the manual was published. However, the fact that PennDOT itself had purchased 3310,000 face square feet of gabion baskets for stream bank erosion control in the 5 year period immediately preceding the year of the trial, and that there are 54,000 miles of streams in Pennsylvania alone. should not be ignored in any analysis of market expectations.

Within 8 months following the revocation of Dura-Corp's license, and while the specter of bankruptcy menacingly loomed, defendants propounded another letter dated November 28, 1990 which was sent to over 200 of Dura-Corp's actual or potential customers, including the County of Allegheny which was its largest and most important. It contained a statement to the effect that Dura-Corp's license had been terminated and that franchise rights to the Risi products had been transferred to another named company. The last nail was thus driven into Dura-Corp's coffin. and any further attempts by Dura-Corp to re-organize were thereby foreclosed. The involuntary bankruptcy was filed within three months thereafter.

* * *

QUESTIONS INVOLVED

1. Whether or not defendants' breach of contract entitles plaintiff to recover the following items of damage:

   a. damages in the form of lost investment capital from potential investors.

   b. damages in the form of lost profits projected over the period of time encompassed by the Successor Licensing Agreement.

   c. damages sustained by the plaintiff for expenditures made, and in property which plaintiff made, transferred or consumed in reliance on the contract.

   d. damages for defendants' malicious interference with plaintiffs distributor contracts.

   e. damages in punitive form for defendants' outrageous and malicious conduct following, the revocation of Dura-Corp's license in the following particulars:

      (1) in arrogantly and callously informing Dura-Corp's product distributors that Dura-Corp no longer had the right to manufacture or sell products encompassed by the Risi patents, and that said rights had been granted to another entity.

      (2) in encouraging Dura-Corp's distributors to purchase Rothbury's patented products made at the Virginia manufacturing plant.

ARGUMENT

A. DURA-CORP WAS NOT REQUIRED TO PROVE AN ENFORCEABLE INVESTMENT AGREEMENT WITH GFG AND IS ENTITLED TO RECOVER ITS LOST INVESTMENT CAPITAL.

Rothbury is asserting the argument (in its Proposed Findings & Conclusions) that plaintiff has failed to prove its lost investment claim with reasonable certainty, because the alleged oral agreement with GFG never ripened into an enforceable contract. According to Rothbury, a number of important terms were unresolved, including the anticipated reduction of the agreement to writing.

Rothbury cites several cases dealing with the requirements of a binding oral contract. These cases deal with situations where one party to the alleged oral agreement is contesting its enforceability. That is not our situation, however. In our case, both parties to the oral agreement admit that there was an oral agreement, and insist that the reason it was not reduced to writing is not because there were material terms still to be negotiated, but because Rothbury terminated the licenses, thereby eliminating any reason for the parties to produce and execute a written document. The focus here should not be whether there was an enforceable oral agreement, but whether it is likely that the GFG investment would have ultimately been consummated, but for the termination of the licenses by Rothbury. Zacharias' testimony clearly supports a finding that the investment by GFG was all but certain, had it not been for Rothbury's actions:

> "Gateway never made any investment into Dura-Corp. After the commitment had been made to invest, we were informed by Mr. Eddy of the loss of the license to manufacture. We hung on, hoping that that could be negotiated. It never was. We never made an investment." (TR. 424)

The Court can readily infer that the failure of the parties to consummate the proposed GFG investment was not due to the lack of mutual assent to the essential terms of the bargain, but rather to the wrongful termination of the licenses. If that is so, then Rothbury cannot escape liability by proclaiming that the parties never fully completed their negotiations, when such failure resulted from Rothbury's own wrongful conduct. Under the common law principle that a transgressor cannot be allowed to profit from his own wrongdoing, Rothbury must answer in damages for causing Dura-Corp and GFG to abandon the proposed transaction. *Alleg. County .Housing Auth. v. Caristo Constr. Corp.*, 90 F.Supp. 107 (1950); P.L.E. Estoppel § 26; *Tarasi v. PNB*, 555 F.2d 1152 (1977), *Harvey v. Minadeo*, 37 Erie 102 (1954) (citing the maxim, "Commodum ex injuria sua nemo habere debet" meaning "no person ought to have advantage from his own wrong." Black's Law Dictionary, 5th Ed.).

Alternatively, even it Dura-Corp was required to prove a binding oral agreement with GFG, the evidence is sufficient for the Court to find that such an agreement existed.

The pertinent case law provides as follows:

> Before preliminary negotiations ripen into contractual obligations, there must be manifested mutual assent to the terms of the bargain. If the parties themselves contemplated that the agreement cannot be considered complete, and its terms assented to, before it is reduced to writing, no contract exists until the execution of the writing. *Essner v. Shoemaker*, 393 Pa. 422, 143 A.2d 364 (2958) (emphasis added).

> An arrangement of terms, in contemplation of a written contract, is not a perfect agreement upon which an action can be maintained, but to produce such effect, it must be shown, by the acts or declarations of the parties, that they intended the agreement to be operative before execution, and

> without regard to the writing. *Onyx Oils & Resins v. Moss*, 367 Pa. 416, 80 A.2d 815 (1951). (emphasis added).
>
> As long as the parties agree on the essential terms they intend to be binding, a contract is formed even though they intend to adopt a formal document with additional terms at a later date. *Field v. Golden Triangle Broadcasting*, 451 Pa. 410, 305 A.2d 689 (1973)). *Courier Times v. United Feature Syndicate*, 300 Pa. Super 40, 445 A.2d 1288 (1982).

The issue here is whether Dura-Corp and GFG manifested their mutual assent to the essential terms of the bargain, notwithstanding their intent to later formalize their understanding in a written document. The testimony of the parties concerning their oral agreement establishes such mutual assent:

1. GFG was to make an equity investment of $2 million in exchange for 80% of the profits until the investment was paid back and 50% of the profits thereafter (Pl. FOF No. 79);

2. GFG would have had decision-making control until its investment was paid back (Tr. 125, 309, 492);

3. The equity funds invested by GFG were to be used to pay creditors, improve marketing and sales, acquire additional production machinery and for operating expenses (Pl. FOF No. 83);

4. The funds were not to be used to repay any part of Thomas R. Eddy's loans to the corporation (Pl. FOF No. 84);

5. GFG would have taken an active role in Dura-Corp's management, and would have been

given the right to name a manager to run the company (Tr. 419);

6. GFG made a "commitment" to invest funds and to become a shareholder in the company (Tr. 417, 436)

7. The transaction was to close in May or June of 1990 (Pl. FOF No. 89)

8. The parties orally agreed on the fundamental terms of the transaction (Tr. 419);

9. The parties, who had been friends and business associates for many years, shook hands indicating the earnestness of their agreement (Tr. 309, 584);

10. The personal relationship of the principals was an important factor in GFG's decision to invest in Dura-Corp (Tr. 490).

The testimony clearly establishes that the essential terms of an oral contract were assented to. It further establishes, with reasonable certainty, that this earnest "commitment" between long-time friends and business associates, cemented by their handshake, would have been reduced to writing and consummated. In like manner, the "foreseeability" of this aspect of Defendants' breach of contract cannot seriously be questioned. Defendants knew of Plaintiffs search for capital infusion as early as February of 1987.

Rothbury relies heavily on the argument that GFG's proposed investment was expressly subject to "PennDOT approval" of the Dura-Hold product, and that this condition was never met. This argument misconstrues the testimony. Passodelis testified that GFG was primarily concerned with PennDOT's "nonstructural approval" of the Dura-Hold product for use in flood control projects (Tr. 628-629). The record is quite clear that Dura-Corp received such approval in March of 1989 (PI FOF No. 36). The

only PennDOT approvals not yet obtained at the time of GFG's oral commitment were the required "mix-design" and "quality control" (or "manufacturing plant") approvals, which were obtained by Dura-Corp in May and August of 1990, respectively. (PI. FOF Nos. 43, 44). These latter two approvals, which Mr. Eddy described as the "final approvals" needed from PennDOT (Tr., 286-289), certainly paved the way for a final consummation of the GFG equity investment no later than August of 1990.

Finally, Rothbury, relies on the testimony of its expert, Dr. Kuehn, to establish that there was no contract between Dura-Corp and GFG for the infusion of investment capital. Plaintiff asserts that such testimony should be wholly disregarded for the following reasons: (1) Dr. Kuehn's testimony in this regard clearly exceeded the scope of his expert report, and plaintiff properly so objected at trial (Tr. 963, 984); (2) Dr. Kuehn, a non-lawyer management consultant, is not qualified to render an opinion on the question of whether an oral contract was formed (the witness has no special knowledge in the area of contract law which could aid the trial court in deciding the issue); and (3) the question of the existence or non-existence of an oral contract goes to a legal conclusion to be drawn by the fact finder and is not a proper subject for opinion testimony. *McCrery v. Scioli*, 485 A.2d 1170 (Pa. Super. 1984). Moreover, expert opinions are generally considered of a low grade and are not entitled to much weight against positive testimony of actual facts. In addition, the Judge or jury may wholly reject the opinion of any witness whether such opinion is contradicted or not. Henry, Pennsylvania Evidence, § 531.

B. PLAINTIFF IS ENTITLED TO RECOVER, AS A RESULT OF THE DEFENDANTS' BREACH OF CONTRACT, LOST PROFITS PROJECTED OVER THE PERIOD OF TIME ENCOMPASSED BY THE SUCCESSOR LICENSING AGREEMENTS.

The Successor Licensing Agreements were executed by the parties on January 16, 1990 and contemplated performance by the plaintiff through the year 2004. Under date of April 3, 1990 defendant Rothbury dispatched a letter to plaintiff ostensibly revoking its license or franchise rights, thereby committing a breach of the Licensing Agreements, per opinion and order of Farino, J.

Generally speaking, the damages available for a breach of contract can be divided into two categories; namely, recovery of the expectation interest if the contract had been performed, and the reliance interest, which is reimbursement for expenditures made or losses incurred in reliance on the contract, the object thereof being to put the plaintiff in as good a position as he would have been in had the contract not been made. Restatement, Contracts 2d., 344, 345; 22 Am Jur 2d. Damages § 44; *Emerman v. Baldwin*, 186 Pa. Super 561, 142 A.2d 440 (1958), citing, *Harman v. Chambers*, 358 Pa. 516, 521, 57 A.2d 842, 845 (1948).

Expectation Interest

This interest and the measure of damages associated therewith is the actual loss sustained by reason of the breach, which is the loss of what the non-defaulting party would have made if the contract had been performed. less the proper deductions. Expressed in a different way, the non-defaulting party may seek to recover lost profits and other advantages which could have been realized from a final performance of the contract. Restatement, Contracts, 2d § 347. Pennsylvania is generally in accord with this proposition. See *Maxwell v. Schaefer*, 381 Pa. 13, 112 A.2d 69 (1955).

To authorize a recovery for lost or prospective profits, it is not necessary that the amount of loss or damage be shown with absolute certainty, but only that it be approximated by competent proof. *Macan v. Scandavia Belting Co.*, 264 Pa. 384, 107 A.2d 750 (1919). Another expression of this legal concept is that damages, under Pennsylvania law, are recoverable for losses caused or for profits and other gains prevented by a breach of contract, if the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. *Day & Zimmerman. Inc. v. Blocked Iron Corp of America*, 200 F.Supp 132 (1961); *Francis v. Darlington Brick and Mining Co.*, 99 Pa. Super 526 (1930). And, in the case of an established business, lost profits may be recovered if they can be made reasonably certain by competent proof. *Watsontown Brick Co. v. Hercules Powder Co.*, 265 F. Supp. 268 (1967); *Macan, supra.*

Some corollaries have developed in conjunction with the foregoing precepts, and Pennsylvania law presently abides by the proposition (1) that evidence of damages may consist of probabilities and inferences as well as on direct and positive proof *E.C. Ernst, Inc. v. Koppers Co., Inc.*, 626 F.2d 324 3rd Cir. (1980); *McElroy v. Filby*, 83 Pa. Super 47 (1924); 11 P.L.E. Damages § 157 et seq; (2) that justice and public policy require that the wrongdoer bear the risk of uncertainty which his own wrong has created *Rea v. Ford Motor Co.*, 355 F.Supp 842 - W.D. Pa. (1973): *Commonwealth Trust Co. of Pittsburgh v. Hackmeister Lind Co.*, 320 Pa. 233, 181 A.787 (1936); and (3) that the law does not demand that the estimation of damages be completely free of all elements of speculation *Taylor v. Paul 0. Abbe, Inc.*, 380 F. Supp. 601 - E.D. Pa. (1974).

It is well settled law in Pennsylvania that loss of profits are recoverable upon proper proof, both in contract and in tort. In contract cases, the general rule allows such damages where (1) there is evidence to establish them with reasonable certainty, (2) there is evidence to show that they were the proximate consequence of the wrong, and (3) that they were reasonably foreseeable. *R.I. Lampus Co. v. Neville Cement Products Corp.*, 474 Pa. 199, 378 A.2d 288 (1977); *Frank G. Bozzo, Inc. v. Electric Weld Division,*

283 Pa. Super 35, 423 A.2d 702 (1980); Restatement 2d., Contracts §351.

1. **Reasonable Certainty**

In the instant case, the plaintiff introduced a plethora of evidence to support its allegation of lost profits. Most of the evidence was contained in plaintiffs business plan which contained all of the details involved in plaintiffs operation. Said details included the cost of raw materials, transportation charges, employee costs, machine and production capacity, production variables, market opportunities, sales studies and break-even and profit estimates, most of which was presented in tabular or graphic form and all of which was gleaned from the plaintiffs actual performance records over a 3-4 year period.

Our Pennsylvania courts have at times expressed a reluctance to award loss of profit damages in "new and untried" businesses because of the lack of "reasonable certainty" presented thereby and contained therein. *See Exton Drive-In, Inc. v. Home Indemnity Co.*, 436 Pa. 480, 261 A.2d 319 (1969); *Pines Plaza Bowling, Inc. v. Rossview. Inc.*, 394 Pa. 124, 145 A.2d 672 (1958); *Pollock v. Morelli*, 245 Pa. Super 388, 369 A.2d 458 (1976). On the other hand, it is well settled that lost income or profit is recoverable in an action for the destruction or interruption of an "established" business whenever they are not merely speculative or conjectural. *Watsontown Brick Co. vs. Hercules Powder Co., supra*; *Macan v. Scandavia Belting Co., supra.*

A question is thus presented as to whether plaintiffs business in the case at bar should be classified as "new and untried" or "established." A close examination of the situation reveals that it should fall somewhere in between. While it is true that the business of making dry cast concrete blocks weighing 1,700 pounds had never been performed anywhere in the world prior to June of 1986. it is equally true that production of said blocks had existed at the Dura-Corp plant for almost four years at the time the defendants breached the contract. A "developing," phase of a new

product therefore had existed which resulted in tax losses for Dura-Corp for the years 1986, 1987, 1988 and 1989. Had such losses been experienced in an "established" business, an argument perhaps could have been advanced that no profit ever could have been made, and any estimate of future profits would have been pure conjecture. In the case at bar, the "developing" phase involved extreme and prolonged effort which included a successful culmination of the following projects:

1. Reducing the original "deal" to writing in November of 1983.

2. Trip to Germany in December of 1983 to inspect and select German machinery.

3. Creation of a corporation and division of ownership as per prior agreements in September of 1984.

4. Procurement of a U.S. patent in December of 1984.

5. Selectively choosing, a central location of manufacturing, facility.

6. Purchase of manufacturing facility.

7. Purchase and importation of German machinery.

8. Specialized modification of manufacturing facility.

9. Installation of machinery and raw material delivery systems and computer mechanism.

10. Commencement of market studies and promotional programs.

11. Resolving production pallet problems and restructuring of product molds.

12. Commencement of process of securing, PennDOT approval.

13. Commencement of process of securing West Virginia, Maryland and Ohio DOT approvals.

14. Development of engineering design manual.

15. Securing PennDOT approval of non-structural application of Dura-Hold.

16. Securing PennDOT structural approval on an experimental basis.

17. Procuring acceptance of Risi patented products by a myriad of governmental agencies which had uses for the products.

18. Effecting sales of Risi patented products in the total amount of $3,798,261.45.

19. Development of engineering refinements of Dura-Hold II.

20. Preparation of Business Plan.

21. Negotiation and Consummation of Successor Licensing Agreements.

22. Negotiation of Contract for equity capital infusion.

All of the aforementioned projects were successfully completed from 1984 through 1989 and the beginning of 1990. Almost all of them were exasperatingly time-consuming and all of them required the expenditure of tremendous effort and substantial

sums of money. Because few of said expenditures were capitalized on Dura-Corp's financial statements, the accumulation of paper losses thereon was inevitable. But, because the projects had been completed and the expenditures had been made, Dura-Corp was, at the conclusion thereof, poised and ready to reap the harvest of profitability.

At that time, vast new markets had been potentially created by the PennDOT approval of March of 1989. Similar approvals of West Virginia, Maryland and Ohio DOT projects were soon to be forthcoming. Dura Hold II had been developed and could be produced twice as fast as Dura-Hold at half the production and transportation cost, thereby creating the substantial possibility of a greatly increased market area with correspondingly increased profits.

The arithmetic associated with PennDOT's non-structural approval for stream bank protection is enlightening and the following figures should be considered. There are 5,280 feet in a mile. The length of a Dura Hold block is 6 feet; its height is 1 foot; the height of an average stream bank wall is 6 feet.[2] It Would therefore take 5,280 blocks of Dura Hold to protect one side of a stream bank one mile in length and 6' in height. Because there are 54,000 miles of streams in Pennsylvania, the potential market therefor in Pennsylvania alone would be 28,512,000 blocks. Because Dura-Corp's annual production from one machine on a one 8 hour shift basis was 37,000 units, it would take 7,700 years to line all of the Pennsylvania streams on one side only. That leaves the other side of Pennsylvania streams and DOT work in the states of West Virginia, Maryland and Ohio to be accounted for.

Somewhat more realistically, it should be noted that PennDOT purchased 330,000 face square feet of gabion baskets from 1990 through 1995. Because each Dura Hold unit contains 6 face square feet (6' x 1'), PennDOT's annual consumption of

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[2]The only evidence of the height of stream bank protection is graphic. All of the evidentiary photographs and videos show stream bank walls, the average of which is more than 6'. No contradiction thereof appears of record.

gabions was the equivalent of 11,000 Dura Hold units per Year, or approximately 1/3 of Dura-Corp's annual production rate from one machine on a one shift basis. It should be borne in mind that PennDOT had already found Dura Hold blocks to be more than cost competitive with gabions and more aesthetically pleasing.

Not of lesser persuasion is the consideration of PennDOT's expenditure of $32,500,000.00 for retaining walls in 1989, the last full year preceding Rothbury's breach. If Dura Hold were used for all of it. it would require 541,666 units of Dura Hold evaluated at $60.00 per unit. If $10.00 per unit is added for transportation the figure would be reduced to 464,285 units, or approximately 13 years of Dura-Corp's said annual production.[3] In view of the fact that Dura-Corp's annual break even point of production was computed at $1,380,300.00, or the dollar equivalent of 23,000 Dura Hold units at $60.00 per unit, the PennDOT approval alone would have in all probability been more than sufficient to generate substantial profits in line with the business plan projections.

2. Proximate Cause or Consequence

Proximate cause has been defined in a virtually unlimited fashion, including the following which is the most frequently used:

> "That which. in natural and continuous sequence, unbroken by an efficient intervening cause produces injury, and without which the result would not have occurred." Black's Law Dictionary, Fifth Edition, 1979; Accord: *Wisniewski v. Great Atlantic & Pac. Tea Co.*, 226 Pa. Super 574, 3231 A.2d 744. 748 (1874) *McCleod v. Union Barge*

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[3]If Dura Hold II were used for all of it, it would require approximately the same number of units at $40.00 per unit and a $5.00 transportation cost. Because the machine cycle time is the same for one Dura Hold or two Dura Hold II, the number of Dura Hold II units per year would be 74,000 on a one machine - one shift basis, and the number of years of Dura-Corp's annual production consumed thereby would be (9) nine.

Line Co., D.C. Pa. 95 F.Supp. 363), 370; *Stemmer v. City of Pittsburgh*, 287 Pa. 365, 135 A.100, 101.

It is difficult to imagine anything more "proximate" than the chain of written communications, commenced by the defendants' revocation letter of April 3, 1990, and ended by their November 20, 1990 letter which was sent to more than 200 of Dura-Corp's actual or potential customers. Can there be any doubt that the aforesaid scenario was intentionally created by the defendants to destroy plaintiffs business and to thereafter salvage all that plaintiff had created for their own use and benefit? The precipitous withdrawal of Dura-Corp's franchise was a lethal blow, carefully crafted by defendants to short-circuit Dura-Corp's success and to assure its certain demise. It had, in very short order, the desired effect. No serious doubt should be entertained that but for the defendants' conduct, Dura-Corp would have enjoyed a successful consummation of its intensive and extensive efforts. At the time of the revocation, GFG's capital infusion was ready to be made. The amount thereof was more than adequate to satisfy all of Dura-Corp's current bills and to provide for future product promotion and plant expansion. Recent PennDOT approval had created a cornucopia of market expansion which would have spread unabatedly to Maryland, Ohio and West Virginia. The development and promotion of the Dura Hold II product would have greatly aided that expansion. The combined effect of all of the foregoing, would have ushered Dura-Corp into a profit arena of great proportions commensurate with the growth and profit projections contained in the business plan.

3. Reasonable Foreseeability

It has been held in Pennsylvania that profits, which are the direct and immediate fruits of the contract, are part and parcel of the contract itself, and must be accepted as within the contemplation of the parties at the time of its execution. *Hendler v. Quigley*, 38 Pa. Super 59 (1909); *Stewart v. Turner*, 72 Pa., Super 235 (1919); *White v. Goodman*, 78 Pa. Super 254 (1922).

Execution and pursuit of an exclusive franchise agreement covering a specific market area contemplates profits as the end result, especially where the franchisee has expended a sum of approximately 4 million dollars to exploit the franchise grant. Need more be said or argued.

The foreseeability of the 2 million dollar infusion of capital from GFG has been discussed *supra* and will not be repeated here.

In light of all of the foregoing authority, which must be considered in proper perspective, two fairly recent cases decided by the Pennsylvania Superior Court must be thoroughly analyzed as they affect, support or modify prior precedents dealing with lost profits as an item of damage in breach of contract cases.

The first case to be considered is *Merion Spring Co. vs. Muelles Hos Garcia Torres*, 315 Pa. Super 469, 461 A.2d 686 (1983). This case was argued before Spaeth, Rowley and Cirillo, J.J. on May 5, 1982. It was decided and filed on May 27, 1983, approximately one year later.

The agreement in question in *Merion Spring*, required the plaintiff to sell and the defendant to buy a certain number of automotive spring manufacturing machines. Following numerous disputes of the parties relating to the physical condition of the machinery and delinquent installment payments made as a result thereof. defendant completed construction of the plant intended to house the manufacturing machines. Because of progressive deterioration of the machinery, defendant did not complete payment of the full purchase price, and did not take possession of the machinery which was listed by the plaintiff for public sale and purchased thereat by plaintiff at a nominal price. Plaintiff then sued for the balance of the purchase price and defendant counterclaimed for breach of contract.

In upholding an award for lost profits to defendant on its counterclaim, the court relied on the Restatement, Second, Contracts §331(I), comment (c) which states in pertinent part as follows:

> "The present section does not purport to divide profits into kinds of classes.. The rule applicable to profits is in no respect different from that applicable to all gains prevented or losses suffered; it is proving income and outgo that the amount of any kind of profit is established. The kind and amount of evidence that will be held to afford a sufficient basis for estimation varies greatly in different kinds of cases."

The court also cited with approval the case of General *Dynafab, Inc. v. Chelsea Industries, Inc.*, 301 Pa. Super 261, 265-66, 447 A.2d 958, 960 (1982) There, plaintiff General Dynafab "arguably a new comer" showed that there was "significant interest" in its product before Chelsea breached the contract, and demonstrated through various means what it estimated to be its lost profits. Those various means included projected sales, raw material needs and profitability of the plant.

On the facts, the instant case is on all fours with *Merion Spring* and should be decided accordingly. There, the Court stated at p. 697 that:

> "The only witness to testify, as to Mueller (defendant's) lost profits was its general manager Cano. ... Cano provided specific data concerning... estimated plant production prices, direct and indirect labor cost, the cost of skilled and supervisory labor, administrative and sales staff and operations expenses... The figures he produced came from his own knowledge; either he personally developed the data in his capacity as Muelles general manager or he was aware of the prevailing rates and figures because of his long association with the automobile parts industry... At almost every point. Cano utilized patently conservative data in estimating Muelles' lost profits... Under ideal or even under more realistic conditions, Muelles lost profits could have been

> substantially higher... We also note that Merion's counsel could not shake Cano's testimony during cross-examination and that Merion presented no testimony to rebut or contradict those matters which Cano asserted to be fact."

And further at p. 698, the Court stated:

> "Furthermore, the imprecision encountered in this case is no greater than that encountered in survival actions brought by the estates of minors where the future earnings of the decedent minors are calculated through the use of statistical averages and future possibilities which no longer have a chance of becoming reality." (citing cases).

The court then re-instated the original award of $200,000 to defendants on the counterclaim for lost profits.

In the case at bar, numerous witnesses offered testimony in support of Dura-Corp's lost or projected profits, all of which was also contained in Dura-Corp's comprehensive business plan. Admittedly, some of the detailed information contained in the business plan was not supported by sworn testimony and could be found to be objectionable unless defendants' use of the information on cross-examination cured the defect.[4] Be that as it may, the sworn testimony of Thomas R. Eddy, Thomas G. Eddy, Alvin Katz, Craig Church, Gary Hoffman, Christopher Passodelis, Louis Gaetano, E.J. Biernesser and Robert Sill which was supportive of lost profits was overwhelming. All of the various and relevant factual categories enumerated in *Merion Spring* were covered adequately and conclusively by them, and much more pertinent information was added thereto. Mr. Hoffman, a completely disinterested chief executive officer of PennDOT, offered testimony on the approval

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[4]The business plan was admitted into evidence with the caveat that any part of it which might be characterized as hearsay would be subject to defendants' objections unless it was thereafter substantiated by sworn testimony and tested by cross-examination.

of Dura-Corp's Dura Hold product and the positive significance of that approval in other governmental agencies both within and without the State of Pennsylvania. He supplied information on PennDOT's dollar volume use of gabion baskets and reinforced the view that Dura-Hold was more cost competitive than gabions, especially in the installation phase of wall erection. Mr. Sill established the fact that the annual budget for PennDOT's general use of retaining walls was in the grandiose sum of $32,500,000.00. Mr. Thomas R. Eddy testified that governmental publications show 54,000 miles of streams in Pennsylvania alone, and that the states of Maryland, Ohio and West Virginia could be added thereto. Mr. Alvin Katz, a duly qualified expert in accounting and finance, accredited the method of tabular and graphic depiction and analysis employed by Thomas G. Eddy in computing Dura-Corp's lost projected profits and discounting the same to $12,929,900.00. In the process thereof, said Thomas G. Eddy, who was also academically qualified in finance and accounting, and a duly elected officer of Dura-Corp, used actual company books and records to lay the foundation for the projections, and supplemented it with intensive research into the potential retaining wall market of Dura-Corp's four-state area.

As in *Merion*, said Mr. Eddy produced his figures from his own personal knowledge, or he personally developed the data in his capacity as plaintiffs vice-president, or he was aware of prevailing costs and selling prices because of his employment as an officer of Dura-Corp. At almost every point, he utilized patently conservative data in estimating plaintiffs lost profits, and here, as in *Merion*, Dura-Corp's lost profits could have been substantially higher under ideal or more realistic conditions. As in *Merion*, defendants' counsel could not shake any of plaintiff s said witnesses' testimony during cross-examination, in particular that of Thomas G. Eddy, and presented no testimony to rebut or contradict those matters which said Mr. Eddy asserted to be fact. It should be emphasized here that no employee or officer of either defendant was called to testify for the defendants. Adverse inferences in support of Thomas R. and Thomas G. Eddy's testimony can therefore be drawn therefrom. Thomas G. Eddy's direct testimony and his projection of Dura-Corp's lost profit using a trend line analysis is acceptable

under the law of Pennsylvania, thereby validating pages 42 through Appendix 8 of the business plan. *See Com. v. Harris*, 186 Pa. Super 59, 63, 140 A.2d 344, 345 (1958) where the court stated:

> "The witness may state relevant facts known to him, because of experience. even though he is not regarded as an expert whose opinion would be admissible upon a hypothetical inquiry... If he has any reasonable pretension to specialized knowledge on the subject under investigation he may testify, and the weight to be given to his evidence is for the jury." (citations omitted).

And further the court held:

> "Whether the knowledge of the witness justifies the admission of his testimony is a matter for preliminary inquiry by the trial court, being largely a question within its discretion, and the affirmative determination as to competency will not be interfered with by this court except in cases of clear error." (citations omitted).

Said Mr. Eddy's testimony was preceded by that of Alvin Catz who qualified as a business expert and management consultant who provided financial, accounting and computer and data processing information to small and medium sized businesses. He was a lecturer in accounting at the University of Pittsburgh and held a BBA degree from Pitt, and an MBA from Xavier University in advanced business economics. He had been a CPA in Pennsylvania for 30 years. He testified as an expert as follows:

1. That plaintiffs business plan was well done and appropriate for a relatively new business.

2. His review thereof included a review of the underlying assumptions and a testing of the financial information.

3. The typical plan of a business with some operating history would present financial statements as well as projections of future operating results, a 3-5 year time horizon being appropriate.

4. Dura-Corp's business plan contains such information.

5. He reviewed pages 49 through 84 of the plan containing tabular and graphic depictions of financial analyses and projections, all of which was in acceptable form of presenting, that particular information.

6. It contained a sales history trend line analysis which is a very popular and accepted method used to project future results based upon historical results.

7. He did not render an opinion as to the accuracy of the information contained therein.

Mr. Thomas G. Eddy supplied said information, all of which was reproduced from Dura-Corp's business records and a great deal of which was initially generated by him as a Dura-Corp officer. Said testimony was greatly bolstered by his testimony which was elicited by Defendants' counsel on cross-examination. All of his testimony considered together with that of Mr. Catz, has created an impenetrable barrier against those who would now contest Dura-Corp's projected lost profits.

The second case deserving mention is that of *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super 90, 464 A.2d 1243 (1983). This case was also argued before Spaeth, Rowley and Cirillo, J.J. It was argued on May 3, 1982 and decided and filed on July 15, 1983, approximately 14 months later (The Merion Spring case was argued on May 5, 1982 and decided and filed on May 27, 1983). It is therefore quite obvious that *Delahanty* and *Merion*

Spring, were circulating in the court during the same term, having been argued within 21 days of one another, and were heard by the same three-Judge panel.

On the issue of lost future or anticipated profits, the court reached divergent results, allowing such profits in *Merion* and disallowing them in *Delahanty*. In *Merion*, the proof was detailed and bountiful despite the fact that the contract was never performed in whole or in part. It was substantiated by a non-expert who had an intimate and exhaustive knowledge of the business enterprise and who was correctly permitted to testify as such. In *Delahanty*, the subject operation had existed for seven months, but calculations of lost profits were "woefully inadequate." The court went on to say at page 1260:

> "Delahanty sought to show a loss of profits by Cascade by introducing an exhibit which contained handwritten calculations, projecting Cascade's operation for 6 full years. Delahanty had prepared this table in preparation for trial, at the request and with the assistance of his attorney. Delahanty testified concerning what he used as the basis for the figures in the table. The basis for his estimations and projections was not, however, established in the record. No evidence was presented that supported the assumption that the business would have a profit the first year of operation and that this profit would increase annually at a rate of ten (10%) percent. ... " (emphasis added).

Delahanty thus is easily distinguished from the case at bar and is not authority for denying recovery of lost profits here. The instant case is, however, on all fours with *Merion Spring* and Dura-Corp's proof of lost profits should be found to be conclusive on that item of plaintiffs damage.

C. BECAUSE OF DEFENDANTS' BREACH OF CONTRACT, PLAINTIFF IS ENTITLED TO RECOVER DAMAGES SUSTAINED FOR EXPENDITURES MADE, AND IN PROPERTY WHICH PLAINTIFF MADE, TRANSFERRED OR CONSUMED IN RELIANCE ON THE CONTRACT.

As was stated previously, the aggrieved party, in breach of contract cases under Pennsylvania law. should be placed as nearly as possible in the same position he would have occupied had there been no breach, and he is entitled to be reimbursed for money paid out and for all reasonable and proper expenses incurred on the faith of the contract. *Harman v. Chambers*, 358 Pa.516, 57 A.2d 842 (1948). Accord: *Emerman v. Baldwin*, 186 Pa. Super 561, 142 A.2d 440 (1958); *DePaolo v. DeRomo*, 346 Pa. 654, 31 A.2d 158 (1943); *Maxwell v. Schaefe*, 381 Pa. 13, 112 A.2d 381 (1955); *Mechanic's Trust Co. v. Fidelity & Cas. Co. of New York*, 304 Pa. 526, 156 A. 146 (1931).

In the case sub judice, a license agreement had been created by the parties under date of November 3, 1983. Between that date and January 16, 1990, plaintiff had expended the sum of 3.8 million dollars in procuring a U.S. patent, building and equipping a state-of-the-art manufacturing facility, and laying the ground work for marketing the patented products in the four state area comprised by Pennsylvania, Maryland, Ohio and West Virginia. During this "development" period, plaintiff produced and sold some of the patented products and reported a loss to the Internal Revenue Service each of the four years of production, namely 1986, 1987, 1988 and 1989.

On January 16, 1990 the parties executed two Successor Licensing Agreements which terminated the previous license agreement upon their execution. Under date of April 3, 1990, Defendants revoked plaintiffs license rights under the Successor Agreements, approximately 10 weeks after they had been executed.

The problem presented by the foregoing facts is whether the expenditures made by the plaintiff under and pursuant to the original license agreement are recoverable for a breach of the Successor Agreements.

Some meager authority exists in Pennsylvania to the effect that expenses incurred prior to the execution of a contract are not recoverable in an action for its breach. *See Smith & Benham v. Curran & Hussey*, 138 F. 150 (1905). It is difficult if not impossible to apply that concept to a franchise agreement where a large lump sum expenditure is made in the very early stages of the contract arrangement for specialized machinery (and/or in the building which houses it) and, under a threat of franchise termination, is forced to enter into a new arrangement in total disregard of the expenditures made in the first arrangement which immediately preceded it. It should not be so easy for the defendants to profit from their evil deeds.

In construing a contract, our Pennsylvania courts have said that we must seek to ascertain what the parties intended and, in so doing, to fully consider the circumstances, the situation of the parties, the objects they have in mind, and the nature of the subject matter of the contract. *United Refining Company v. Jenkins*, 410 Pa. 126, 189 A.2d 574 (1963). The question of damages for a breach of a contract should not be treated differently.

In the case at bar. the plaintiff had expended the sum of 3.8 million dollars pursuant to the initial franchise agreement. That expenditure had equipped the plaintiff to perform those activities contemplated by the successor agreements, and without which no performance would have been possible. Proper consideration should be given also to the fact that a patent has a circumscribed existence, and if not fully exploited during a given period is forever lost to competition. For these reasons, it can safely and fairly be deduced that no successor license agreement would have been proffered if plaintiffs pioneering, expenditures had not been already made and its manufacturing facility had not already been built. There can be no serious doubt that plaintiffs manufacturing ability and promotional success were contemplated equally by both parties to

the successor contract, and that all expectations were based thereon. The same or similar rule has been stated in 22 Am Jur Damages §44. as follows:

> "It is apparent that the measure of damages recoverable for a breach of contract in each case must have relation to the nature and purpose of the contract itself, as viewed in connection with the character and extent of the injury. Thus, protection of the restitution, reliance, and expectation interests is not exclusive...
>
> Comment: It has been noted that these interests are not inflexible limits on relief. In a situation in which a court grants such relief as justice requires, the relief may not precisely correspond to any of these interests." (emphasis added).

The "such relief as Justice requires"concept has been granted to our appellate courts by statute. See 42 Pa. C.S.A. See. 706 where it is stated as follows:

> "An appellate court may affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances." (emphasis supplied).
>
> See also Restatement, Contracts 2d §344.

The rule contained in *Smith v. Benham, supra*, has surely been emasculated by the foregoing equitable and legal propositions. In support thereof, it should be noted that our research has discovered no new cases in Pennsylvania which expostulate the view.

D. PLAINTIFF IS ENTITLED TO RECOVER DAMAGES FOR DEFENDANTS' MALICIOUS INTERFERENCE WITH PLAINTIFFS CONTRACTS.

The record speaks loudly and clearly to this issue, and the trail left by defendants' malevolence is unmistakable. Not only did defendants respond maliciously and negatively to plaintiff's written attempt to revive the franchise agreements following their abrupt termination, they almost immediately informed in writing Site Control Systems, one of Dura-Corp's contract distributors, that Dura-Corp's franchise had been terminated and that its distributor agreement was no longer viable. At the time this occurred; namely on April 25, 1990, Site Control had been employed as a distributor from April 19, 1989 and had accumulated sales of Dura-Corp's products in excess of $340,000 during that one-year period.

Because plaintiffs promotional efforts were about to shift into high gear, and because of DOT approval in Pennsylvania and pending approvals in Ohio, Maryland and West Virginia, it can be validly deduced that sales for Site Control Would have equalled or exceeded the aforementioned sales figures for every like period encompassed by the successor licensing, agreements. A factor of 13 is deducible therefrom, making a total projected accumulation of Site Control's sales over that period of $4,420,000.00.

The same analysis can be made for Dura Sales which entered into a written distributor agreement on October 1, 1990 which was in effect terminated by defendants on May 30, 1991, approximately 8 months later. During that period, Dura Sales sold products in the total sum of $405,575.00. Using a factor of 19, Dura Sales' total over the period of the successor agreements would have accumulated to $7,705,925.00, thereby making a grand total from distributor contracts of $12,125,925.

Defendants' wanton disregard of plaintiffs rights did not stop with the April 25, 1990 letter. Under date of November 30, 1990, defendants delivered a final barrage of written communications to more than 200 of Dura-Corp's actual or

potential customers, including the County of Allegheny which. because of the Pine Creek project, was the largest and most important. The Pine Creek Project. over a period of less than 2 years, involved sales of $472,000.00 for the use of Dura Hold for stream bank protection against flooding. The letter, dated November 28, 1990, stated that Dura-Corp's license had been terminated and that franchise rights had been transfer-red to another named company. Needless to say, the Allegheny County business ended with the letter. A more arrogant and brazen interference with contractual relationships can hardly be imagined.

The law on this subject in Pennsylvania is quite clear, and is succinctly stated in 7 P.L.E. Sec. 7 as follows:

> "Interference, without Justification or privilege, with a legal right arising out of the business, occupation, or contracts of another is a tort which may be redressed by by a common law action... to recover damages for deprivation of the advantage or benefit to which the Plaintiff was entitled."

It has also been stated that interference had its origin in "malice" and has remained almost entirely an intentional tort. Prosser on Torts 2d Ed. Sec. 106.

Our Pennsylvania courts have generally held that actionable interference is malicious, and have gone on to say that maliciousness does not necessarily mean actual malice or ill will, but instead may mean the intentional doing of a wrongful act without legal or social justification, or may mean the wanton disregard of the rights of others. *Dora v. Dora*, 392 Pa. 433, 141 A.2d 587 (1958): *Eddyside Co. v. Seihel*, 142 Pa. Super 174 15 A.2d 691 (1940); *Klauder v. Crega*, 327 Pa. 1, 192 A. 667 (1937); *Caskie v. Philadelphia Rapid Transit Co.*, 334 Pa. 33, 5 A.2d 368 (1939). *See also Arvins v.- Moll*, 610 F. Supp. 308 (1984), affd. 774 F.2d 1150 and *Consolidation Coal Co. v. District 5, United Mine Workers of America*, 336 Pa. Super 354, 485 A.2d 1118 (1984).

Because loss of profits is recoverable in Pennsylvania in tort actions, and the proof required seems to be practically the same as in breach of contract, Plaintiff herein affirms and incorporates its previous "lost profits" analysis under the breach of contract argument. In support of the said requirement of proof in tort actions, *see Kosco v. Hachmeister, Inc.*, 152 A.2d 673) (1959); *Ashcraft v. C.G. Hussey Co.*, 359 Pa. 129, 58 A.2d 170 (1936). Thus, the general rule for recovering lost profits in a tort action requires evidence to establish them with reasonable certainty. and evidence that they were the proximate consequent of the wrong. No foreseeability is required. *Delanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super 90,. 464 A.2d 1243 at 1258 (1983); *Francis v. Darlington Brick & Mining Co.*, 99 Pa. Super 526 (1930). Otherwise, Pennsylvania law does not distinguish between suits brought in tort actions and those brought for breach of contract. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205 (1970).

The tort of malicious interference with contracts has been clearly established in the case at bar and compensatory damages in the form of lost earnings and/or lost profits should be awarded to the plaintiff.

E. PLAINTIFF IS ENTITLED TO RECOVER PUNITIVE DAMAGES FOR DEFENDANTS' OUTRAGEOUS AND MALICIOUS CONDUCT FOLLOWING THE REVOCATION OF DURA-CORP'S FRANCHISE

The law in Pennsylvania on punitive damages is both old and revered, and new and dynamic, and admits of little or no uncertainty. Said damages, which are in addition to compensatory damages, are frequently and properly given, being designated variously as punitive, exemplary or vindictive damages, 11 P.L.E. § 14. Thus, punitive damages are damages other than compensatory or nominal damages which are awarded against a person to punish him for his outrageous conduct. *Phillip v. U.S. Lines Co.*, 240 F.

Supp. aff'd. 355 F.2d 25 (1965). Also, punitive damages will be allowed for torts that are committed willfully, maliciously or so carelessly as to indicate wanton disregard of the rights of the injured party. *Adelman v. Rosenbaum*, 133 Pa. Super 3886, 3 A.2d 15 (1939); *Lake Shore & M.S. Rv Co. v. Rosenzweig*, 113 Pa. 519, 18 W.N.C. 162 (1886); *Philadelphia Traction Co. v. Orbann*, 119 Pa. 37, 12 A. 816 (1888). It is equally well established that exemplary damages must not be disproportionate to the award of compensatory damages, and that in determining the amount thereof, not merely the activity must be considered, but all surrounding circumstances, including, the motives of the wrongdoer and the relation between the parties must be considered. *Hughes v. Babcock*, 349 Pa. 475, 37 A.2d 551 (1944). It has also been stated that exemplary damages are penal, not compensatory, in nature, and the judge or jury fixes the amount of such damages without a yardstick, subject only to reductions by the court if deemed excessive under the circumstances of the particular case. *International Electronics Co. v. N.S.T.Metal Products Co.*, 370 Pa. 213, 88 A.2d 40 (1952).

The cases which have considered the award of punitive or exemplary damages in Pennsylvania over the past century are legion, and no constructive purpose would be here served in citing or explaining all of them.

Our Superior Court has done just that in the relatively recent case of *Delahanty v. First Pennsylvania Bank, N.A.*, cited and explained *supra*, for another legal proposition. In that case, the court awarded compensatory damages for the tortious destruction of the plaintiff-s business in the sum of $40,000.00. A ratio of 11 to 1 was applied thereto which resulted in a punitive award of $440,000.00 which the Court found not to be so clearly excessive as to require a reduction on that issue.

In the case at bar, the conduct of the defendants following the revocation of Dura-Corp's franchise was flagrant, outrageous and in wanton disregard of plaintiffs rights in the following particulars:

1. In arrogantly and callously notifying Dura-Corp's distributors and all of its other potential or actual customers that Dura-Corp's franchise had been forfeited.

2. In directing Dura-Corp's distributors to purchase all future patented products from Rothbury.

3. In informing in excess of 200 of Dura-Corp's actual or potential customers, including Allegheny County, that Dura-Corp's franchise had been terminated and that all of Dura-Corp's rights had been transferred to Camber Corp.

4. In permitting and encouraging products made outside the state of Pennsylvania to be shipped into parts of Dura-Corp's exclusive territory.

The foregoing acts of the Defendants constitute a breach of the fiduciary duty owed by Defendants (franchisors) to the Plaintiff (franchisee). and justify a punitive award of 11 times the Plaintiffs compensatory damages.

Respectfully submitted,

/s/ John D. Eddy
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